

SCHOOL OF
CIVIL ENGINEERING
INDIANA
DEPARTMENT OF HIGHWAYS

JOINT HIGHWAY RESEARCH PROJECT

FHWA/IN/JHRP-86/8

Executive Summary/Final Report

AN INVESTIGATION OF CLAIMS
AND DISPUTES SETTLEMENT
BY ARBITRATION FOR HIGHWAY
CONSTRUCTION

Gary R. Smith
Donn E. Hancher



PURDUE UNIVERSITY

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To: H. L. Michael, Director
Joint Highway Research Project

March 27, 1986
Revised September 26, 1986

From: D. E. Hancher, P.E.
Research Engineer

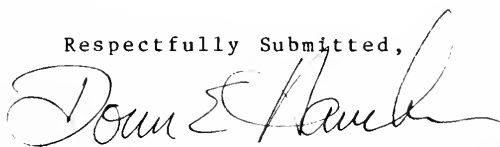
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The attached report is the Final Report on the HPR Part II study entitled "An Investigation of Claims and Dispute Settlement by Arbitration for Highway Construction." The report has been authored by Mr. G.R. Smith and myself. The Executive Summary is also included.

This report investigated the application of arbitration in highway construction dispute resolution. The report covers the development of the arbitration method from both private and public contracts. A review of the states that currently use arbitration provides a basis from which a system for arbitration may be developed for the Indiana Department of Highways. All objectives of the research were accomplished.

The findings of the study were reviewed with the Indiana Department of Highways and implementation may be possible, should the Department desire. This report is submitted for review and approval to fulfill the objectives of this project.

Respectfully Submitted,



Donn E. Hancher
Research Engineer

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EXECUTIVE SUMMARY

Final Report

AN INVESTIGATION OF
CLAIMS AND DISPUTE SETTLEMENT BY ARBITRATION
FOR HIGHWAY CONSTRUCTION

by

Gary R. Smith
Graduate Instructor in Research
and
Donn E. Hancher
Professor of Civil Engineering

Joint Highway Research Project

Project No: C-36-67Q
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Prepared as Part of an Investigation

Conducted by

Joint Highway Research Project
Engineering Experiment Station
Purdue University

in cooperation with the

Indiana Department of Highways

and the

U.S. Department of Transportation
Federal Highway Administration

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EXECUTIVE SUMMARY

E1.1 Introduction

This report represents an overall status review on the use and implementation of arbitration in public highway construction agencies. The preparation of this report was in response to the desire of the Indiana Department of Highways to investigate the potential applications of arbitration as a binding method of dispute resolution on highway construction contract claims. The potential for claims exists in all construction contracts and an expedient, but economical method of resolving issues becomes an important consideration. Traditionally, claims have proceeded through a full litigation process that is both time consuming and expensive. Arbitration is touted by many professionals as a less costly and more efficient method of resolving claims.

Several states have used arbitration as a resolution procedure but little evidence of their success or failure exists for other agencies to evaluate. The majority of the information recieved for this report was through numerous telephone interviews and conversations. Agency opinions

were generally biased against using arbitration. Contractors were not necessarily fully supportive but, in general were more supportive. The primary negative response was that the system was not procedurally adequate, with the largest complaint centered around the decision process. Decisions seemed to lean toward accomodation and equity rather than toward contracts and specifications.

The final report includes a complete review of the statutes and procedures of the primary state transportation agencies currently using arbitration. It was hoped that a common format could be discovered among these using state agencies. In brief, the states involved in arbitration hearings each have their own peculiarities. No substantive recommendation is possible on the effectiveness of arbitration because of the diverse procedural methods and various restrictions on issues available to the arbitrators to decide. Several areas are identified as significant areas of concern for planning and implementing arbitration.

E1.2 Objectives

The objectives of the study were necessarily broad scope due to the general lack of information available regarding arbitration for public highway construction projects. The stated objectives were as follows:

1. Evaluate the arbitration processes of states using

arbitration for settlement of highway construction contract disputes.

2. Survey administrative agencies and contractors in user states for their experiences with arbitration.
3. Investigate an appropriate form of arbitration for the Indiana Department of Highways.
4. Develop a method of implementation of arbitration for IDOH contracts, if deemed feasible.

The first and second objectives were jointly completed as a result of industry contacts and administrative agency information and data. Opinions regarding the applicability of arbitration ran the full range from highly supportive to absolute dislike. Many opinions were fringed with the comment that the method was adequate but the implementation was not functional. Several special applications of arbitration systems for major civil works projects were also reviewed in the report as examples of result oriented planning in the construction claims area.

The third objective was particularly important for the implementation objective stated in objective four. Although the Indiana Department of Highways currently has not experienced a large number of contract claims, the companion report by Berg (1983) demonstrates that most Indiana constructors and highway agency personnel feel more claims

should be expected in the future. This trend is not yet apparent, but the planning and development of an alternate resolution system for claims should be considered.

Several recommendations were made to the IDOH as potential improvements in the resolution of highway contract disputes. Several issues preclude the current adoption of formal arbitration procedures by the IDOH, therefore several alternatives were proposed in addition to arbitration procedures. Mediation appears as an untested alternate technique that might be considered prior to considering arbitration. As a result, the implementation of arbitration was not made as an unqualified recommendation.

E1.3 Principle Features of Arbitration

The principle features provided by arbitration can be enumerated as follows:

1. Arbitration is usually a private hearing. The necessity of transcripts for possible cost sharing by the Federal Highway Administration adds to the cost and time elements of the hearings. Even with transcripts, the FHWA reserves a case by case evaluation of participation in claims settlement.
2. Costs associated directly with the hearing are lower. Preparation costs may be about the same for either litigation or arbitration.

3. The speed of settlement is questionable, but overall a claim can be settled sooner by arbitration than by litigated settlements. Some of the speed available in arbitration is provided by a general absence of discovery procedures.
4. The scope of issues that can be decided by arbitration panels can cover all aspects of the contract, or the scope of issues can be restricted in the legislation developed for enabling the agency to participate in arbitration. Factual issues are most appropriate and interpretive issues like quality and application of specifications are less appropriate.
5. The arbitration panel is a key element in the types of decisions reached. Panels can be legislated as pooled, fixed or a fixed pool. Ancillary to the panel is the method of certification of panel the members. A mechanism for certification needs to be equally balanced between all the parties to the contract or responsive to all segments of the eligible users of arbitration. A problem with bias is inherent in the system when a peer review is mandated.
6. The claims/payment ratios that could be substantiated, for two states, indicate that arbitration settlement costs are higher than jury verdict proceedings. Although this may be true on the surface, it is

doubted that a contractor could economically file claims under \$10,000 in court. These smaller claims would be much more feasible for an arbitration process.

E1.4 State Procedure Variations

The claim value limitations for arbitration in states allowing arbitration are either wide-open or have an established ceiling. A rough consensus indicates that around \$100,000 is the maximum claim to be heard. The flexibility could also be exercised to establish both upper and lower limits, but public contracting might require that all claims have an opportunity to be heard.

The selection of arbitration panel members was also inconsistent among these states. The panels ran from fixed, with fixed terms, to an open pool of available arbitrators without specific terms of availability. The difficulty with the panels is first with certification of panel members and second, finding mutually convenient times for panel hearings. This implies that fixed panels and hearing times would be best. However, if a fixed panel is desired, a board of contract appeals similar to those that deal with Federal contracts might better answer the need. In addition, fixing the parameters of the method only reduces the flexibility of arbitration.

Certification of arbitrators is a question of qualifi-

cations of the parties applying for certification as well as a question of maintaining adequate records of those certified. If more than one branch or department within a state would use the arbitration service, an independent office could maintain the records and certification process with minimal overhead expenses. Costs of maintaining the staff and certification procedure should be borne by all involved parties through the hearing charges.

The prior discussion touched on another difference in state procedures. Administration of the system is also handled in a variety of approaches. The largest groups tend to maintain the system within the highway department or through an affiliate state agency, while other states have delegated the administration to the American Arbitration Association.

E1.5 Recommendations

The most direct recommendation to be made is that in all circumstances the State Highway Agency (SHA) should encourage negotiation based on principles and not on a 'winning or losing' concept. The organizational structure of many SHA's actually delay decisions because of the multiple layers of review. Early negotiations can settle many disputes that are potential claims at a lower cost.

Prior to accepting any particular solution method that

relinquishes control to a third party, it would make considerably more sense to work with a process that encourages continued negotiation such as mediation. Although there were no references found for any existing state agency or highway department that has used mediation, it may not involve any additional legislation to provide for a mediated settlement, unless there are difficulties in procuring proper payment for the services through existing accounts.

If the method is desired by both the SHA and the contracting community, a permanent list of available mediators could be developed and maintained, or the mediation services of the American Arbitration Association could be used. If mediation fails to resolve the claim, both parties still have the court system or possibly an arbitration system to work with for final settlement.

If there is inadequate support for mediated settlements, legislation will be required for the SHA's to engage in arbitration. The initial formulation of the legislation should be such that arbitration is available on a consensus basis rather than a mandatory settlement procedure. This may be the desired format for the final arrangement, since not all disputes are best presented at, nor determined by, an arbitration procedure. The disadvantage to this alternative is that in most cases people are more comfortable with methods and procedures that are familiar and few cases may be selected for arbitration.

There are several areas of concern for arbitration in the public sector that should be fully evaluated prior to initiating an arbitration system. The primary area that needs to be discussed is the overall goal for using arbitration. In particular, the discussion on this issue should center around two issues. First, the system be providing a needed service, and could this service be better addressed through another channel? Construction claims are expensive to resolve and only larger claims will be taken to court unless there is some substantial legal point that can be made by a smaller claim. Therefore, in most circumstances a need exists to provide a legal alternative or third party settlement of smaller claims.

The second issue concerns the limitations of the size of claims allowed for arbitration. The variation in arbitration systems indicates that there are two predominate theories of what size claims are applicable for arbitration. The limited scope arbitration, where a top limit is placed on claims that can be paid out of an arbitration proceeding, can have the objective of providing a forum for small contract disputes and therefore providing a service to smaller contract claims. Unlimited arbitration is a uniform procedure for all claims regardless of dollar amount or contractor size, but it also requires a more regulated system for control.

The issue of legislation was identified in several areas of the discussion. Several needs must be addressed for developing the final format for the arbitration system. If arbitration is to be accepted by the groups that are using the system, then they need to be included in the formulation of the legislation. If possible, someone familiar with arbitration should be consulted during the development; perhaps the AAA could be consulted in this regard. Other interested groups would be the contracting groups that work with the IDOH, the administrative department that would be in charge of administration of the proceedings and certifying qualified arbitrators, and possibly other state agencies that are involved in construction that would be interested in having the system available for use on other claims. Staff and funding could be shared between departments or agencies that will use the services.

Certification of the arbitrators is another area that will demand close scrutiny before the system should be accepted. A high standard of qualification will reduce the available pool of arbitrators, while a low standard of acceptable qualifications will open up the arbitrator pool to less knowledgeable people. Within this context is the problem of engaging active professionals in all construction related areas that will be required to judge acts or omis-

sions of fellow practitioners. Impartial arbitrators in this respect may be difficult to obtain.

Another issue that has created some negative opinions of arbitration is when decisions do not follow commonly accepted principles of contract law. To counteract this problem, a lawyer could be required as one panel member or at a minimum, decisions could be reviewed for legal requirements. A careful balance must be maintained between protection of the legal interests and operational simplicity in the system. Requiring that at least one panel member be a lawyer may encumber the decision capability of the panel to the point that it loses its operational simplicity.

The issue of Federal participation in any claim is still judged on a case by case basis with no guarantees for any claim resolution. There is a concern here that, although the arbitration panel has deliberated on the facts of the case, there may not be a record of how the case was actually decided. It is important that proper documentation of the claim and hearing be available for review in the case of Federal participation, or at least access to proper backup information as requested. The central issue in this argument is the necessity of having a court recorder and transcript of the hearing. If this is a requirement, the costs of the court recorder and transcript preparation should be shared equally between the parties. Again, tran-

scripts will slow the decision process and increase costs.

The preceding issue involves another issue to a certain extent. Discovery is not typically permitted in arbitration unless specific guidelines or language to this effect is included in the legislation or procedures. It might possibly be better to examine the formulation of a more exacting standard for submission of changes and claims rather than permitting extensive discovery procedures. Exactly what type of information to include in the submission is not within the scope of discussion here, but the concept is brought forward as an alternative to allowing discovery. Limited discovery is also possible, but as much can be accomplished in the prehearing conference as limited discovery will permit.

Another method to reduce the issues in arbitration is a prehearing meeting where the parties, along with the arbitrators, could reduce the generalities of the submission statement into a list of issues and facts that are the central focus of the dispute. However, a prehearing meeting will also consume time and will have cost associated with it as well. These may become negligible if the prehearing conference would encourage the parties to resume negotiations.

A serious concern for arbitration is unwarranted claims that are submitted or claims that cannot be based on facts

from the project records. Spurious claims can be prevented if a penalty is available for the arbitrator to impose for such claims. One method to penalize those that submit unwarranted claims is to have the arbitrator charge all hearing costs, preparation costs and attorney fees of the defendant to the plaintiff. This penalty provision in the legislation should also be available for the contractor in the case where a claim should have never occurred. Overall, this consideration is to prevent abuse of the arbitration hearings and provide a punitive measure for those that attempt to file unwarranted claims.

E1.6 Conclusions

Arbitration, at least initially, should be on a discretionary basis. The most flexibility for selection of a forum is when the parties have a choice of process. The discretionary states identified earlier have not utilized the process to full advantage or have not permitted the process to mature. As a pragmatic estimate the claims, submitted to arbitration should not exceed \$150,000 in value.

The study clearly demonstrates that arbitration for public construction has as many variations in structure and format as there are arbitration users. Moreover, the study also shows that a great deal of advanced planning and cooperation between potential system users will be necessary for satisfactory implementation.

The specific legal issues and legislative requirements to implement arbitration systems are subjects outside the scope of this investigation, but these do have significant impact on formulation of the arbitration procedures. Therefore, unless these factors can be considered in total while developing the statutory version, trial applications should not be attempted to test the water. Without complete formulation of the procedures, frustration and discouragement are probably assured. Once legislation is approved, the damage done by poor preparation of the statute cannot be recovered.

Arbitration can be an effective alternative to the courts as long as the parties using arbitration are aware of the limitations and potential difficulties that are created when a particular system is selected. An agency anticipating using arbitration should evaluate their goals for implementing the system, as well as familiarizing themselves with all other available alternatives, such as mediation. Private and public arbitration have some distinct differences in concept and flexibility. Hopefully, these have been adequately discussed and clarified in the main report.

EXECUTIVE SUMMARY

Final Report

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Gary R. Smith
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and
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Project No: C-36-67Q
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CHAPTER 1 INTRODUCTION

The Indiana Department of Highways has been involved in several major legal disputes with contractors. Although this has not approached an epidemic scale, a recent survey of both Indiana contractors and Indiana Department of Highway personnel indicates that both groups felt that more disputes will carry over into litigation (9). Additional discussion of this survey is presented in Chapter 4. Should the anticipated increase become reality, the costs associated with defending or instituting litigation will place a great burden on both the IDOH budget and contractors' capability to continue operations. Complex litigation typically requires testing, special consultants, paid expert witness testimony and consumes substantial time of principle employees for preparation. A method that would reduce the time and cost of resolving these potentially expensive and lengthy claims would be a great benefit to both the Indiana Department of Highways and the highway contracting community.

The process of contract administration for a construction project is complex and a highly subjective process when it is examined beyond the guidelines and legalities of the contract documents. Personal opinions, bias, and other

nonquantitative human factors are as much a part of the process as the contract documents. Often, disputes are more related to personalities than to a factual difference. However, there is always the possibility that the contract documents may be the source of these disputes and claims because of improper wording or interpretation problems. Regardless of the source of a construction claim, the overall impact of a claim to both the public agency and the contractor is counterproductive.

Identification of a process to reduce the adversary relationship between the contractor and the owner may help in preventing the process of litigation. However, the highest cost is incurred when the internal procedures of both the contractor and the owner fail to consider the cost of a final dispute resolution forum. Therefore, the purpose of this study is to investigate the potential advantages and liabilities of processes that are alternatives to the litigation process.

Negotiated settlement is the most desirable but, unfortunately, not all disputes are settled amicably. Negotiation between parties that are not on the best of terms may prove to be just a slight delay prior to the extended process of a court resolution. A slightly more formalized procedure that parallels the negotiation process is mediation. Mediation is still in the infancy stage for construction, but may be a

viable process in certain circumstances.

Arbitration has developed into a common alternative to the litigation dilemma and has been adopted by many industry associations as a recommended dispute resolution forum. The rapid growth of arbitration in the private sector should be an indication of the potential of the method. In 1966 there were only 460 construction cases administered by the American Arbitration Association (19). By 1984 the volume of cases had increased to a case load of 3150 cases (24). This represents a 585 % increase over 18 years. The aggregate value of the claims resolved through arbitration in 1984 was approximately \$500 million. A recent case in Texas was settled where the owner filed a \$10 million claim against a design and construct firm. The arbitrators were not required to settle this case, the negotiations apparently resulted in a solution after two weeks of hearings (4). Typically, an arbitration claim is not a large dollar item, but cases have reportedly been settled in the \$8 million range. The public sector side of construction arbitration is not as well established with fewer statistics available on the frequency of claims. The relevant data for individual states is discussed in Chapter 5 as well as statutes relating to arbitration in Indiana.

Mediation and arbitration are only two of the possible alternatives to litigation. There are also mini-trials,

document escrow with panel review and other specialized claims processes. Some of the special systems developed for projects will be reviewed in Chapter 2. The primary emphasis of this report will be on the feasibility of implementing an arbitration system for the IDOH.

1.1 Objectives of the Study

The objectives of the study are listed below as a guideline to the primary focus of this report.

1. Evaluate the arbitration processes of the states that are using arbitration for settlement of highway construction disputes. The large majority of states allow arbitration in contracts but often it is not included in highway construction contracts.
2. A survey of the administrative agencies and contractors of the states was needed to develop a measure of effectiveness and experiences with arbitration. Primarily the purpose here was to contact individuals who are working within states that currently use arbitration to develop a feel for the effectiveness of arbitration based on their experience.
3. Investigate the appropriate form of arbitration for implementation within the IDOH administrative process if deemed feasible and identify the requirements necessary for implementation.

4. The final area that needed to be investigated was the implementation phase. Arbitration of public contracts claims for the IDOH may need specific legislation to enable arbitration clauses to be included in their contracts. Sample legislative efforts from arbitration states were to be reviewed.

Additional areas that were to be identified and evaluated along with the primary objectives were the format for using arbitration in claims settlement and a brief review of other methods.

1.2 Scope of Study

The objectives of the study were somewhat restricted because the intent was not to re-invent the wheel for construction claims and contracts. There is, however, a lack of understanding in many cases regarding the background of arbitration. A complete discussion of the services of the American Arbitration Association (AAA) and procedures is included in the background discussion. The AAA has the most experience as an organization with the administration process and has developed a refined process for arbitrating construction disputes. In fact, their procedures and services have been selected to administrate construction disputes for public construction projects in Delaware and Arizona. The scope of the study can most easily be presented by discussion of the phases involved in completing the research.

The initial phase of research involved a literature search. The literature search indicated that arbitration is not a popular literary topic in construction. In fact, there were no references for literature regarding public highway arbitration in the American Arbitration Association library files. As a result of this gap in the literature available, much of the information compiled in the literature search was taken from brief articles from a variety of sources and was consequently pieced together. The apparent lack of concise references for arbitration involving highway construction claims is understandable due to the lack of written decisions and transcripts of most cases. Arbitration, as discussed later, does not follow a precedence relationship with prior cases unless by some chance a single arbitrator had presided for the parties on a previous claim that had similar components.

Telephone contacts were perhaps the best source of information and several contacts provided a wealth of information on the topic. The value of these contacts cannot be measured appropriately nor can sufficient credit be noted for those individuals willing to discuss the issues. Often the individuals noted that what they were saying was personal opinion and not an official posture of the organization for which they worked. Therefore, the names of the

individuals contacted are not included as part of this research. Some of their opinions are included since they have experienced the arbitration system first hand and they highlighted various advantages and disadvantages of arbitration for public agencies.

The ultimate purpose for this study was to present to the IDOH a comprehensive view of the arbitration process and the experiences of other governmental units that have similar practices. Whenever a study is performed of this nature it is desired that the researcher conclude that "Method A is better than Method B." The comparison is difficult in claims and arbitration because each and every case has peculiarities that are inseparable from the project uniqueness and the forum that is used to examine the claim. It is hoped that the conclusions reached herein will at least enable others to appreciate the power of arbitration and also understand the limitations as they apply in a general sense. The final result of the investigation will not be a blanket endorsement of arbitration or condemnation. Instead the final section will present what should be considered by a public agency that is considering the establishment of an arbitration system.

CHAPTER 2 DISPUTE RESOLUTION PROCESSES

Before discussing claims resolution processes, the basic idea of a dispute and a claim needs to be clarified. Claims and "claims conscious contractors" have become synonymous with troubled projects. However, in view of contract documents, most contractors are merely using the legal devices established for their protection and, therefore, claims should be viewed as proper exercise of eligible rights. Genuinely frivolous claims are rarely carried into any formal dispute resolution process.

Owners, including public owners, have already established much of their protection during development of the contract documents. In many public construction documents, a specific effort is made to describe the necessary administrative procedures and documentation requirements to assure the proper determination of a claim. These requirements are often a preventive measure to keep any claim from developing into mature litigation. Disputes are common on a construction project and are founded on the basic nature and interests of the two parties to the contract. The owner is interested in getting the highest quality and quantity for the least cost. The contractor is interested in completing

the project for a profit by using the least costly materials and most expedient procedures available. Neither side has any genuinely homogeneous interests, therefore, disputes should be expected. The entrenched attitudes of the parties only become more hardened when a requested change is denied or possibly not fully investigated on the merits of the problem, but is denied based on 'principle.'

There is a slight misconception that the only available remedy for obtaining a contract dispute settlement is to start a legal action. This is certainly not the case; and some public contracting agencies have adopted procedures other than litigation to settle construction claims. There are three common methods for final settlement in the public sector, after all administrative procedures have been exhausted, which are: the courts, boards of contract appeals and arbitration.

Although these avenues for resolution are available, the most successful solution in any claims situation is not to have to call on a third party or panel, but to settle the dispute prior to initiating formal procedures. Negotiated settlements are based on terms that both parties can agree with and are willing to abide by. Therefore, the negotiation process will be discussed prior to the claims resolution processes. Although brief, these discussions will provide a basic background for some later comparisons.

2.1 Negotiations

Various books, papers and articles have been prepared for examining the appropriate postures and strategies that are employed in a negotiation. Negotiation generally means that a common ground for discussion exists and both sides desire to settle. The level of desire for settlement may, however, vary considerably. Certainly an owner that is collecting interest on construction funds may not be too willing to try for a quick settlement. In public construction, the budget may not be flexible enough for a large claim settlement and the owner is interested in minimizing the claim or settling at the smallest possible amount. A resistance point for a contractor would be the smallest monetary figure that would be acceptable for resolving the issue. An owner's resistance point may be described as the largest amount that the owner is willing to expend to settle the issue.

In most cases, there is a positive overlap between the resistance points of the parties that a skillful negotiator can exploit, provided that both parties are negotiating in good faith. Often the most compelling issues for reaching a negotiated settlement are time and cost. If work is being held up pending resolution or payment being held for lack of completion or unsatisfactory work, the parties may be willing to negotiate sooner and be more willing to express

areas of accommodation. Standard preparation for a claim in litigation can consume funds and personnel time that could be productively spent on other problems.

Negotiated settlements are definitely more desirable than protracted litigation, arbitration or claims appeals boards. An important theme to keep in mind is that the parties can continue to negotiate before and during other proceedings and that parties that are still negotiating are in control of the settlement agreement. When the dispute requires a third party determination, the control of settlement has been relinquished and terms established by the formal settlement procedure generally have legal force behind them for settlement, regardless of the terms.

There are two traditional negotiation stances. The soft position is taken by those negotiators that do not wish to be involved in conflicts of any sort regardless of the nature of the conflict. They are more than willing to make concessions for settlement and will often make their first offer very near to their lowest possible negotiating point. They feel that this will show the opposing party that they are willing to make concessions on issues and hopefully the other side will reciprocate concessions or accept the offer. The opposing stance is the hard negotiation. This is the popular contest of wills and the "wait and see if they collapse" position. In construction, particularly with the low

bid process of public construction, the two sides are involuntarily placed into these negotiating positions. The circumstances surrounding the claim will often dictate exactly how the parties will approach the negotiating table. Most people, fortunately, do not find either stance particularly appealing and hybrid negotiating forms have evolved which are neither soft or hard positions.

The Harvard Negotiation Project developed a negotiation strategy that has been recommended for claims and disputes settlement. The method is a principled negotiation and has been published as "Getting to Yes" by Fisher and Ury (18).

Principled negotiations are centered on four rather basic areas or factors.

1. People: Separate the people from the problem.
2. Interests: Focus on interests, not positions.
3. Options: Generate a variety of possibilities
 before deciding what to do.
4. Criteria: Insist that the result be based on some
 objective standard.

The separation of the people from the problem is a point of concern in construction contracts. Daily exposure of the Resident Engineer and the Superintendent often gen-

erates some very biased disputes. Needless to say, the egos of the parties may contribute a great deal to the problem that is unnecessary. Once these two have set their positions and egos, it is difficult to then suggest that one should accommodate the other. This may occur on one or more occasions but somewhere along the line a 'get even' strategy will evolve. However, if both could be convinced that it is to their mutual benefit to attack the problem together, then perhaps progress toward a solution may be made. If the problem has sat around for any length of time, then perhaps negotiation will not be productive, at least not with these particular negotiators. Time always has a tendency to harden positions in negotiations. Therefore, the next level of authority for both parties should be brought into the negotiations to resume talks. Hopefully, the next level of authority can preserve respective employee egos while working toward a solution.

Focusing on interests does not mean to compromise nor does it mean that one side should totally capitulate. Positions do not help either side to be effective negotiators. This means that there is no bottom line but rather there is a common interest in settling the dispute. In construction claims the common interest points are document interpretation and project completion. The owner would like to have a completed project and the contractor would like to get paid and move on to the next project. The longer the contractor

is on a project after the anticipated completion time, overhead costs slowly absorb profits. The owner may be losing rental payments or beneficial use of the project. What needs to be found is an agreement that will most likely satisfy interests of both sides as much as possible and in a timely fashion.

Options are not always easily seen when a dispute is flaring up. There are three immediate options that exist on a project. The first option is the "do nothing" solution; rarely satisfactory for either party, but always an alternative. Second and third are the initial positions of the two parties. These would require capitulation of one or the other. The last two are obviously unsatisfactory to both parties or why would they be attempting to negotiate? One possible answer to negotiations that are not truly negotiations occurs when litigation has been started and one or both parties are using the negotiations process as a fishing expedition. The parties are better off if they can think in terms of mutually acceptable goals and options. Some options generated may be far fetched, but they may be better than the alternative of litigating a settlement. Alternative methods of settlement are not limited. Many creative settlements can be developed, which satisfy or attempt to satisfy all interests. Then the negotiators can focus on which of the proposed methods of settlement can best satisfy both parties. This forces the discussion in a

positive direction. Negotiated settlement is the only solution method that can possibly end up with a win-win solution.

There has to be a standard against which the result can be measured or based. Reason with the other party and yield only to a well-founded principle, not to any pressure that has been applied. Standards in construction abound but they are generally not applicable on a project level problem unless there are interpretive specifications or performance specifications. Generally, standards can be extracted that both parties can agree to and development of some agreement could easily encourage additional participation and agreement on other issues. Equipment rates, labor rates, material costs or rental invoices are examples of standards that can be agreed on, with few or no objections, and provide a common basis for evaluation.

If the negotiation process fails to resolve the claim, a formal resolution process needs to be implemented. The owner, in setting up the contract documents has a great deal of control over what procedure will be used. As such, the owner must be aware of the fact that the courts will require a little higher standard of the party that originally distributes the risk through the contract documents. Both parties must be aware of the fact that once negotiation fails, a third party will be brought into the discussion for the

purpose of settling the issue. In either litigation or binding arbitration, the decision is final and except for extenuating legal circumstances will not be altered.

Many times, public agencies have a tendency to believe that they are the only source of work for contractors. They may control the greatest portion of the volume, but contractors also have other alternatives available to them. This attitude is often reflected in negotiation tactics by the hard sell position of public owners. This position is aggravated by low funding limits and fixed project budgets for public agencies. When the owner does have a large influence on the contracting community, but does not negotiate "fairly," the contractors will eventually increase prices to cover this behavior. Contingencies will be increased to cover areas where the contractor has had problems in the past with particular owner personnel or within a particular jurisdiction.

Negotiation will always be the best opportunity and often the least costly for claim and dispute resolution, but unfortunately, not everyone recognizes the advantages in comparison to the alternatives. A fair and equitable treatment of the contractors will not only aid in the negotiation of disputes, but in the long term will lower contingency items and therefore, the cost of construction. The long term effect of goodwill between the owner and contractor

takes a long period of time to develop. Moreover, when both parties are dealing with each other in a direct and fair manner, the long term trend would be expected to be fewer frivolous claims and earlier settlements on all disputes.

2.2 Mediation

Mediation is the relatively new method for dispute resolution in construction contracts. Mediation, at this time, is primarily supported through the American Arbitration Association. Mediation is nothing more than a third party neutral assisted negotiation. The assistance comes from a neutral third party that meets separately with the parties and jointly to point out areas of agreement and weaknesses in arguments. The mediator does not participate in settlements but acts as a catalyst to keep the negotiation process moving.

Very little has been done in the construction industry with mediation. In 1984, twenty cases were submitted to mediation and only two in 1983. Most of the cases involved claims in excess of \$500,000 and one that was \$8.5 million. The \$8.5 million claim was settled in six hours, according to the article (24). In addition, the AAA is planning to publish new information on mediation that is more specific on confidentiality, mediator qualifications and authority. Construction industry mediation rules are supplied in Appendix B.

A mediator, like a good negotiator, recognizes the resistance positions of the two parties. Typically, a mediator will work separately with each party in an attempt to find out if there is room in their respective positions for agreement. The mediator does not get involved in actually designing the agreement but rather, acts as a go between. In joint sessions the mediator needs to identify issues that the parties have reached agreement on and what the remaining issues are before a settlement can be finalized. In addition, the mediator can identify weak or unfounded issues that will need additional clarification or possibly elimination from the discussions. An important function of a mediator is to not release information on positions directly. In private sessions one party may indicate that they are willing to settle for a figure different than the figure presented at the negotiating table. This information is confidential and needs to remain as such. However, if both parties release this information to the mediator, the mediator can evaluate if there is a common area for settlement. The negotiator must develop and maintain a high level of confidence with both parties to be successful. Mediation has great potential for use in construction claims resolution. Perhaps the largest problem will be to find a mediator that both parties will be willing to use with confidence.

2.3 Litigation

Litigation is by far the most prevalent method associated with public construction claims settlement. The courts have a long history of decisions relating to construction disputes of every nature. However, in allowing the contractor to institute litigation, the owner must examine what potential impact the outcome will have.

Construction contracts will generally include numerous parties that may all be involved in the litigation. Contractors, subcontractors, suppliers, testing firms, architects/engineers, manufacturers, sureties and of course the owner. Generally it will be the contractor that initiates the claim and will normally try to include every conceivable party to the claim as possible. Of course, this means that all the parties named in the suit must have some sort of contractual relationship or privity of contract with the contractor. Owners often find themselves in the position of being the only party with privity of contract with the contractor and even though the design engineer is actually at fault, the contractor may only sue the owner. The owner must then seek separate recourse from the design engineer and possibly risk not collecting from the engineer.

Other considerations the contractor will look at in deciding the best strategy, will be financial capability, jurisdiction, venue and importance of a particular party to

the action. Contractors would most likely wish to file against a major public owner in Federal Courts rather than a local court with jurisdiction. In most cases a major construction contract will qualify for Federal Court if the parties are residents of different states or involve a federal question and the dollar value of a claim will exceed \$10,000. In general, a State Court will be able to hear any claim as long as it is not specifically reserved for federal jurisdiction. In cases where more than one court will qualify under the jurisdictional questions, the plaintiff will attempt to select the most advantageous for the particular situation. Some of the factors to be considered are a favorable judge, area of plaintiff's residence and the docket load of the court under consideration.

Often the first step after the filing requirements have been met is for the court to call a pretrial hearing. The purpose for pretrial hearings is to clarify the issues of case and attempt to obtain admission of facts and documents that are agreeable with both parties. The overall objective is to employ whatever means possible to aid in speeding the settlement of the claim.

The discovery stage of the litigation is to obtain what evidence is necessary for preparation prior to trial. There are several ways information can be obtained for trial preparation. Depositions, interrogatories, requests for

documents and requests for admission. Depositions are oral testimonies under oath of persons who are familiar with or have knowledge relevant to the case. A transcript of the testimony is normally taken by a stenographer and copies made available for both parties.

Interrogatories are a list of written questions that are answered in writing under oath. The written responses are, generally, carefully reviewed prior to return so interrogatories may be of somewhat less importance than depositions. Less important in the respect that information can be somewhat concealed or veiled in the responses which will effectively reduce the factual content. Interrogatories may only be taken of the parties and not others as in the depositions. Another purported weakness in the interrogatory is that they are very time consuming between draft reviews and mailing.

Documents can often supply a great deal of information. Generally either party has the right to formally request copies of documents held by the other party. In addition, an important issue in some construction cases is allowing testing and sampling of materials within the scope of the claim. Examples of documents that are important in a construction claim are as follows:

- The original schedule
- As-built schedule

- Bid documents
- Progress reports
- Correspondence
- Daily diary or foremens reports
- Test results
- Change orders
- Material Certifications
- As-built plans
- Telephone call logs

Although this is not an all-inclusive list, the possible volume of documents becomes close to unmanageable for proper evaluation.

A request for admission is a request that is served by one party to get an admission of truth to particular matters. The purpose of admission is to eliminate certain issues of the case that both parties agree on. The requests are generally specific enough to require only a simple yes or no response or a very brief explanation.

With the completion of discovery, hopefully, issues have been narrowed as much as possible and it is always conceivable that a settlement will occur before any trial takes place. Pretrial settlements often occur based on the weight of the evidence produced during discovery. In construction cases the presentations made during the opening stage of the trial are intended to set the stage in broad brush terms and

show the positions of the parties. The evidence presented will then normally be presented in a chronological fashion and the level of detail will increase for each area. Cross examination of plaintiff's witnesses follows and then the defense will present evidence. The plaintiff then can cross examine the defendant's witnesses. The whole purpose of cross examination is essentially to discredit the other parties' presentation. Summary presentations are made by both sides and the case concluded. Depending on the situation, the trier of fact may be a judge or a jury, who makes a decision based upon the evidence presented. Judges are required to present findings of fact and conclusions of law and will delay the decision presentation until complete documentation is finished.

If, after the decision, either party feels that there is an error in the finding they may appeal the decision. Settlement is enforced by a writ of execution which authorizes seizure of property if the judgement is not paid.

In a court trail there are many nuances that must be observed and there is always the possibility that a legal error or poorly prepared presentation may nullify a justifiable recovery. Construction projects are complex arenas and when they are presented to a lay jury, the terminology, not to mention technology, is a cause of confusion. Progress is slow when the jury must receive a minimal level of instruc-

tion on basic techniques, definition of terms and industry practices. However, it is better to assume that the jury knows nothing in the technical areas and prepare for several mini-seminars that will aid the jury in evaluating evidence presented.

2.4 Arbitration

Arbitration, as the primary subject, will be given a very brief definition at this time. A full explanation and development will follow in later sections.

Arbitration is a less formal, somewhat less costly and faster method for resolving claims. Every alternative to the court solution will have proponents and opponents and arbitration is certainly no exception. Arbitration has been viewed by some people as a 50-50 division of the claim. It may be true that few arbitrations clearly define fault and award total damages requested by either party, but most times the award is adjusted to a level that complies with the information presented.

Construction arbitration draws supporters from the requirement that the arbitrators are knowledgeable in the peculiarities and complexities of the construction industry. Arbitrators are often well-known individuals that are well respected within the industry for their expertise or at worst, they may not have national reputations, but are well

versed in the topic through industry affiliation or practice. The less constrained atmosphere of a conference room rather than a courtroom is a factor that appeals intuitively to many supporters of arbitration. Typically, the rules and procedures are less restrained than the procedural rules of a courtroom and the arbitrator may hear testimony that would normally not be permitted in court. Hearsay evidence is an excellent example of evidence that is permissible in arbitration that is not admissible evidence in a courtroom. The arbitrator can permit hearsay evidence, if it will help to clarify issues. However, it is up to the arbitrator to weigh the evidence appropriately.

Many arbitration hearings are held before a single arbitrator. A panel of three is commonly used for very complex cases or where the parties request a three member panel. Arbitration will normally require less total calendar time to arrive at a decision. The overall time span of arbitration hearings may occasionally be longer than the time for hearing evidence in a court hearing, due to lawyers' delays or schedule problems of the arbitrator. Many arbitrators are active in other businesses or have other duties that prevent them from devoting many consecutive days to the hearings. The hearings are generally held at intervals if the case needs more than one or two days to present evidence. Arbitrators are not normally compensated for most of their cases. Compensation can be included, but

is typically limited to support for travel, lodging and meals unless some other arrangement has been made with the arbitrator. Depending on the length of time the presentations take the parties are only responsible for support costs of the arbitration and filing fees.

There are few statistics available for arbitration experiences for public agencies. State processes and a detailed evaluation of arbitration are presented in later sections.

2.5 Contract Appeals Boards

The third method of dispute resolution for public construction is the development of contract appeals boards. This system is well established in the Federal government and the majority of the following discussion will be directed toward the various procedures of these review boards. The general discussion that follows is in the context of the federal contract appeals boards. Some public agencies at the state level have opted to form state level review boards which function in a manner similar to the federal boards.

Each federal agency that engages in construction has the right to establish contract appeals boards to hear contract disputes. If the agency does not encounter enough claims to warrant a full-time panel, their cases may be

deferred to another agency review board. A federal claims review board is comprised of an appointed panel of a minimum of three impartial administrative judges. There are a few restrictions or qualifications for the panel members. Each panel member must have a minimum of five years of experience in public contract law. Their jurisdiction is not limited to construction disputes, but over all contracts that are involved with procurement of property and services. Construction is included under the services area.

The procedures within the board hearings are similar to those of a court. The judges can subpoena witnesses, administer oaths, authorize depositions and subpoena appropriate records to the claim. As with the court system both the government and the contractor have the right of appeal to the Court of Claims. One particular item of note with this system is that under the Contracts Disputes Act of 1978, the contractor has the right to file the claim directly with the Court of Claims and bypass the appeals board procedure entirely.

Another particularly interesting item of the federal claims review board is the fraud provision of the 1978 law. A contractor must certify that the information is accurate and complete. If there is evidence of fraud in the claim the government can recover the value of the claim from the contractor. This is an obvious attempt to prevent frivolous

claims from being presented to the board. The decisions of the contract appeals boards are written and can be cited as a legal precedence in other cases.

The procedures for filing the claims are well established and if the requisite schedules are not adhered to the contractor may have to surrender any further action. The first step in the procedure is to submit the claim in writing to the contracting officer who has been identified in the contract documents. The contracting officer has sixty days to issue a response to the claim. A \$50,000 or less claim will be decided by the contracting officer within the sixty day period. If it is more than this amount, the contracting officer can either issue a decision or stipulate a date when the decision will be made. After receipt of the decision the contractor then has ninety days within which an appeal may be filed with the agency board unless the choice is made to go directly to the Court of Claims in which case the time period is one year. If an appeal is needed out of the board decision, it must be submitted within 120 days of the decision. A single member of the board can rule on claims less than \$10,000 and must render a decision in 120 days. Some rules may differ between agencies, so the contractor must review the particular agency rules prior to filing a claim.

Some states have taken the federal system as a model to establish administrative review boards. As with the federal agencies the capabilities of boards vary greatly and their decisions may not be binding in some states. The track record of state level appeals boards is not well established as is the case with arbitration.

2.6 Special Project Level Procedures

Some agencies in public construction have found that all their existing contracting and claims procedures are inadequate to meet specific needs of unique projects. Typically these projects have been major civil works that need special attention to prevent disputes from tying up the project over extended periods of time. Several are presented here to indicate what changes or innovative methods can be considered in major projects or possibly for application to long term programs.

2.6.1 Eisenhower Second Bore

On some major projects special construction contracts have been set up that go to great lengths to try and prevent the debilitating affects of a dispute. The Eisenhower Second Bore contract is a good example of the ability of a public body to recognize a potentially claim ridden contract and make an effort to resolve the problem prior to contract initiation (21).

The contracting agency, the Colorado Division of Highways, had a major advantage in developing this system, which was prior experience on the first bore. Most of their experience was bad. Delays and claims held up completion of the first bore by two years and the final cost increased from the original estimate of \$54 million to \$108 million at completion. The decision was made to revise the entire contract formulation to avoid a repetition of the first bore contract mistakes. Although the project was issued as a single contract, various portions were packaged to ensure tighter cost control. Within the contracts themselves, exculpatory language was removed and modified unit price contracts established. Extensive and more rigorous prequalification requirements were established including the listing of anticipated project personnel and relative experience. An independent review board was established for resolving any project disputes. They were selected by a procedure common to selection of arbitrators with the exception that they were compensated through a three party contract for the duration of the project.

The most unusual aspect of the contract was the requirement for escrow documents. Since the owner wished to preserve as much information as possible in the event that a dispute occurred, the bidding contractors were required to submit sealed detail data from their bidding documents. Once the bids were read, the low bidder's documents were

opened and reviewed for adequacy and then returned to the contractor to place into an acceptable depository. The documents of the other unsuccessful contractors were returned, unopened, after the successful contractor had been selected. The escrow documents were to be available only to a select list of highway department officials in the case of a major claim to evaluate what the contractor had interpreted prior to the contract. The contractor voluntarily extended the privilege to the review board as well. In addition multiple escalation clauses were included to cover long term cost increases on some materials and labor.

The extensive amount of contract preparation and planning led to a very successful project that involved only three minor claims. The project capably demonstrates what can be done to prevent claims when the effort is made to control the situation early in the contract. A great deal of the foresight in this case came from prior experience at the same project location. Although few, if any, similar chances will occur again, the key topic of submitting contract documents into an escrow account for later evaluation is appealing. The escrow effectively prevents any manipulation of data prior to analyzing claims.

2.6.2 Metropolitan Atlanta Rapid Transit

The Metropolitan Atlanta Rapid Transit Authority (MARTA) selected arbitration as the dispute resolution

process for a billion dollar program (19). They reviewed several other alternatives to the court system and for a while had no contract language for claims procedures. Even though there was no specific language for claims resolution they proceeded to let several contracts. The system evolved as a modified arbitration system after reviewing what other metropolitan areas had experienced with dispute resolution on similar projects.

The system for claims resolution involved a chain of command approach. The arbitration system was available only after a full staff counsel review had occurred. They targeted a two week period for review of a claim once the contractor had requested a final determination. This involved a second group of committees, comprised of top level personnel. Their final decision was then subject to arbitration at the request of the contractor. The administration of the hearings was conducted by the American Arbitration Association. If the dispute involved a claim of \$25,000 or less, a single arbitrator was used who, by the agreement language, had to be a lawyer. Larger claims were decided by three member panels of which at least one member had to be a lawyer. The requirement of having at least one lawyer on the panel or to be the sole arbitrator originated from convincing arguments of the local legal professionals. Their contention was that arbitration decisions, at times, did not follow any legal basis for arriving at decisions. Inclusion

of a lawyer on the panel would provide a minimal amount of insurance that the decision would have a legal foundation as well as the freedom of an arbitration hearing.

In addition to securing a legal presence on the panels, the clauses prepared for the MARTA arbitrations included; allowing the use of federal rules of discovery, all decisions had to follow laws applicable to government procurement contracts, and the arbitration clause was mandatory in all subcontracts.

The system, at the time of initial publication, was operating successfully and few cases had reached arbitration. However, a follow up report indicates that the program has had some difficulties. MARTA has avoided arbitration on claims involving amounts over \$250,000. The reason for the limitation is the agency's dissatisfaction over arbitrators decisions on legal matters. Overall MARTA has found that arbitration is "equitable, expeditious and inexpensive (23)."

2.6.3 Milwaukee Pollution Abatement Program

The Milwaukee Metropolitan Sewerage District (MMSD) formed a special group for risk and claims management on a \$1.63 billion project that is expected to run until 1996 (31). Their data indicated that settlement costs in construction disputes ran from 10% to 40% of the contract cost.

The purpose of the group was to develop and implement a cost effective program for timely resolution of construction disputes.

The final program, suggested by the group, provided for equitable risk sharing, dispute prevention and claims settlement. The major areas that the group worked on were the changed conditions clauses. Other recommendations were that the MMSD make extensive underground investigations and develop specific divisions on risk. The group proposed a breakdown on risk distribution that reflected their interpretation of the contracts and how the project would proceed. Owner-furnished material, site access, contract modification, defective specifications and acts of MMSD were all assigned as owner risk items, while means and methods of construction, permits, site safety, contractor materials, bonds and cost escalations (except for contract changes) were assigned to the contractors. Areas for shared risks were delays, insurance and outside influences.

When the article was written \$131 million was under contract and the cost of claims was only 1% (some claims were still pending). This project shows a success story to date and, most importantly, how a well developed contract system can alleviate claims. The importance of this program is that it shows what can be done to prevent claims from developing rather than letting them happen and trying to find a method to resolve them.

These three projects are indicative of the advantages to be gained from advanced planning and preparation for construction claims. The experiences gained by these three projects may provide field tested claims resolution systems for future construction projects. Although not every agency will have opportunities as great as these projects provided, a public agency could view their entire annual budget and other long range plans as a "project". The advance preparation and planning towards risk distribution and claims prevention would have a positive benefit as these projects have demonstrated. The variable nature of construction projects will often require innovative solutions for equitable risk distribution. In public agencies the initial resistance towards change and innovation must be overcome before these plans can take effect.

CHAPTER 3 ARBITRATION BACKGROUND

The primary mode of settling construction disputes has traditionally been negotiation. Approximately 80 percent of all disputes are settled at the project level. Another 10 percent are resolved through departmental administrative review proceedings. The remainder are settled in review boards and commissions or through litigation or arbitration. Arbitration is probably the least used alternative in public construction. Before discussion of the function of arbitration and various procedures, a brief review of the development and background of arbitration will be helpful.

The courts are most commonly viewed as an adversary hearing. The myriad collection of rules, procedures and practices of the courts are often frustrating to the layman and occasionally to the legal professional as well. Arbitration on the other hand, is considered to be directed more toward a resolution process and not as procedure and rule dependent. The less rigid set of rules and processes generates a certain amount of appeal to many people. The more informal atmosphere of an arbitration hearing tends to aid in maintaining a fairly good relationship between the parties during all phases of the hearing process. The

background and history of arbitration will show the development and legal "authority" for placing arbitration measures into construction documents.

3.1 History

"Access to a court is a matter of right in litigation. ... In contrast, arbitration is a process to which no one is automatically entitled, by constitution or by statute. Rather, it depends upon the agreement of the arbitrating parties for its existence (15)." This refers to consensus arbitration which is the basis for many arbitration agreements. Where arbitration is compulsory this does not hold true. Arbitration, when instituted as a resolution procedure for claims settlement, is compulsory if it is the only recourse. This is an important division, because if the parties have no choice as to arbitration or litigation then the discussion of relative merits of one system compared to the other is somewhat moot. Most of the historical development that follows is based on the voluntary arbitration issues and not compulsory arbitration. Therefore, as the development is traced it should be kept in mind that, in general, the parties agreed to arbitrate and not litigate.

Arbitration is not a new phenomenon. The origins of arbitration have been traced into the 13th century. The focus of this section, however, will be on the development of arbitration in the United States. Construction

arbitration does not have a very long history in the United States but the procedure would probably not exist now without various other industry and labor concerns that instituted arbitration, providing a foundation to work from.

American jurisprudence is centered upon the court systems and English common law. Contracts are included in the civil laws and, more importantly, are part of the common law system where the "law" is established through the doctrine of "stare decisis." Stare decisis is the doctrine of judicial precedence. Once a judicial ruling is made, the interpretation is then carried through to other cases having similar context. Occasionally the precedent doctrine takes a shift from previous decisions as the social and economic concerns necessitate a change.

Arbitration was historically prevented from having any measurable effect by judges that were protective of their domain. This was not too difficult for them to do. All that the dissenting party needed to do was to file in court on the question of arbitrability or legality of the arbitration clause and, in most cases, the arbitration clause was found to be inappropriate. However, as the court dockets grew in size and the time for bringing a case to hearing extended, pressure by businessmen for arbitration gained momentum towards acceptance and approval. It is important to recognize the business pressure because this is often the mobil-

izing force behind initiating legislation on arbitration statutes today. Construction industry associations and groups are active participants in developing and supporting arbitration as a dispute settlement technique.

New York State was the first to pass an arbitration statute. The law was initiated by the State Bar and was enacted in 1920. Five years after the initiation of the 1920 New York law, the United States Congress passed similar legislation. Many of the early arbitration statutes appeared in important commercial states. A 1948 contract law textbook for business students included two paragraphs for arbitration. The following excerpt is indicative of a changing trend toward arbitration and in part was taken from the 1927 Pennsylvania act (23).

"A number of jurisdictions, including New York and Pennsylvania have enacted a statute which virtually enforces specifically contracts to arbitrate. ... These statutes declare a new policy and abrogate an ancient common-law rule by making arbitration agreements in written contracts valid, enforceable and irrevocable."

Although arbitration was still a long way from general acceptance, a slight change in attitude toward arbitration was evident. This attitude change can be partially explained by two basic reasons. First, business disputes could be more amicably settled in a different atmosphere and arena. Second, commercial arbitration could substantially

decrease the number of cases heard by the courts. Time for settlement of the dispute also became a motivating factor. The reason that commercial or business disputes lend themselves to an alternate forum comes from the fact that the laws have been written to effectively give criminal cases a priority over civil litigation. Thus, it often happens that when a trial date for a construction contract dispute is initially scheduled, it often is delayed by the judge to give a "speedy" trial to a criminal case. Time is also considered when the issue concerns the withholding of funds due to a contractor or an owner. If a contractor has to wait four years to receive payment through the courts, he has effectively lost the use of those funds in the company for that period of time and worse yet, may have borrowed funds to cover the shortfall. Speed in resolution would help reduce this type of adverse impact.

In 1926 a not-for-profit organization was founded and named the American Arbitration Association. During this period of time the general attitude of the courts was to enforce arbitration awards already rendered, but agreements to arbitrate future disputes were not enforceable. The statutory arbitration clauses reversed this court decision trend and gave arbitration agreements the foundation they would need to survive. The arbitration statutes that included the ability to arbitrate future disputes are termed "modern arbitration statutes."

The first significant work with arbitration was done in the labor relations area. During World War II arbitration was frequently used in settling labor cases. The concept became established in American Law as a result of a series of decisions by the Supreme Court in 1960 involving the United Steel Workers. These cases are referred to as the "Steelworkers Trilogy (34)."

The first effort to develop a Uniform Arbitration Act was developed by the National Conference of Commissioners on Uniform State Law and approved by the American Bar Association House of Delegates in 1955. Today, 43 states, including Indiana, have adopted modern arbitration statutes. Many of which were developed from the Uniform Arbitration Act. Tennessee became the 43rd state to adopt a modern statute on May 26, 1983. Other states, which do not have "modern arbitration statutes" have arbitration statutes that apply to existing controversies only and do not extend to arbitration on future disagreements.

Many variations exist within these state laws regarding exclusions of certain types of disputes. Texas, for example, specifically excludes arbitration from construction disputes or as in the case of the Indiana statute; leases, loans and sales are excluded in the state arbitration act. Indiana excludes leases, loans and sales from arbitration since they are covered under the Uniform Commercial Code.

Since 1960, arbitration has become an accepted and established method for dispute settlement in maritime disputes, corporate shareholder disputes, automobile insurance claims, medical malpractice and construction disputes (34). The American Arbitration Association (hereinafter referred to as AAA) estimates that over half of the construction contracts in force in the United States today have an arbitration clause incorporated in them. The majority of these contract documents have come from standard agreement forms that have been developed by various trade associations.

The development of the construction side of arbitration in the United States is a fairly recent development. Although arbitration clauses have appeared in construction contracts as early as the 1800s, they were hindered by the same enforcement problems that all arbitration cases experienced (34). In 1964 a joint committee between the AIA and the AGC (American Institute of Architects and the Associated General Contractors of America) initiated a survey to determine the effectiveness of arbitration procedures. Their primary recommendation was to designate the AAA as the sole administrator of an arbitration system that was tailored specifically for the construction industry. The National Construction Industry Arbitration Committee (NCIAC) was initially formed by the Consulting Engineers Council (now the American Consulting Engineers Council), American Institute

of Architects, Associated General Contractors, Associated Specialty Contractors, Inc., and the National Society of Professional Engineers. This group adopted the Construction Industry Arbitration Rules with the AAA as the administrator. Today NCIAC has 10 member organizations. In addition to the five enumerated above the American Society of Civil Engineers, American Society of Landscape Engineers, American Subcontractors Association, Construction Specifications Institute and the National Utility Contractors Association have joined the NCIAC. This effort is maintained through 35 advisory committees that are located in metropolitan areas across the United States. The commercial interest of these various groups indicates that even today, economic concern spurs the development of arbitration and encourages continued use.

Recent evidence of the overall acceptance of arbitration by the court system is best demonstrated by the Oregon House Bill 2361, which became effective on October 15, 1983. The bill established a permissive court system by which the state circuit and district courts can make a court annexed arbitration scheme available for settling certain types of disputes. The eligible and ineligible subjects of arbitration are defined, as well as the procedures for operation and the procedure of the arbitrations. Unlike arbitration between private parties, the court annexed arbitration is a public record like the decisions of the courts.

3.2 American Arbitration Association

The most logical place to begin an overview of the arbitration process is with a discussion of the AAA methods and the Construction Industry Arbitration Rules. As mentioned earlier the AAA has been established since 1926 and probably represents the oldest formal arbitration group in the United States. The objective in this section is to become familiar with the arbitration process and to present the services offered by the AAA.

The AAA was founded "to foster the study of arbitration, to perfect its techniques and procedures under arbitration law, and to advance generally the science of arbitration (1)." Income for the nonprofit organization comes from the administrative fees charged for services and contributions from supporting members as well as sales of arbitration related literature. Membership is open to both individuals and organizations. It should be noted that a member of AAA is not an arbitrator, only a member, and arbitrators that work with the AAA need not become members as part of the qualifications to become an arbitrator. The AAA itself is not the deciding body, but rather a source for qualified impartial arbitrators. The decisions by the arbitrators are the binding and enforceable portion of the arbitration process. In addition to providing arbitration services, the AAA also administers fact finding, conciliation

and mediation services, either separate from or in conjunction with arbitration. The AAA is a primary source for educational material and publications on arbitration as well as providing training sessions for arbitrators. They also maintain a complete library collection of publications and pamphlets on all aspects of arbitration.

The best way to explain the AAA is to describe the actual procedure of filing a claim and what steps are necessary to resolve a construction contract dispute under the AAA Construction Industry Arbitration Rules. This entire discussion is predicated on the fact that an enforceable arbitration clause is part of the contract and is therefore the proper solution method.

A typical contract provision for arbitration is written in the contract as follows:

"Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled in accordance with the Construction Industry Rules of the American Arbitration Association, and judgement upon the award may be entered in any court having jurisdiction thereof. (1)"

In the case that such a clause was not part of the original contract, a signed statement of agreement by both parties that describes the issues between them may be used to initiate arbitration under the Construction Rules.

If all the preceding events are in force, the Submission to Arbitration Agreement must be filed with the AAA. Upon receipt of the Submission, the AAA sends each party a list containing the names of technically qualified arbitrators for review. In construction disputes the list will typically contain names of contractors, engineers, architects, builders or other people that are familiar with the construction industry including lawyers. Depending on the dollar value of the claim, a single arbitrator or a panel of three arbitrators will be selected.

The selection procedures are simple. The parties are each given seven days to review the list of names provided to them. They may strike any name that is not acceptable to them from the list and then number the remaining names in order of preference. The information is provided only when requested. The next phase for selecting the arbitrator(s) is for the AAA to compare the two lists and appoint an arbitrator both parties have approved. If they did not agree with any of the submitted names, then either additional lists may be sent or the AAA can appoint an arbitrator as long as the one appointed was not crossed off by either party. In the case of three arbitrators, generally, one arbitrator is selected by each party and the third is then selected by the two appointed arbitrators. Again if there is trouble obtaining agreement on the third arbitrator, the AAA may appoint the third member.

After selection of the arbitrators, the AAA consults with the parties to determine a mutually convenient location and time for the hearing. These arrangements are made directly through the Association to prevent individual contact between the arbitrator and the parties prior to the hearing. This relieves some of the routine administrative burden of the case from the arbitrator.

The parties may request a prehearing conference or it may be suggested by the Association if it feels the case merits such an arrangement. In complex cases this could be very beneficial to establish procedural concerns. Some of the procedural items discussed could be document exchange, scheduling of hearings, panel composition, witness lists or transcript requirements.

The hearings are generally less formal than courtroom procedures and arbitrators are not required to follow civil procedure rules for submission of evidence. It is the arbitrators duty to determine what evidence is relevant and admissible in the proceedings. The arbitrator may admit evidence that typically would not be admitted to a court and the evidence weight is determined solely by the arbitrator. Each party may be represented by counsel, but the hearings are conducted more like a business meeting than a court session. Normally the complaining party presents their case first, followed by the respondent, but again this is not

always the case. Each party must try to convince the arbitrator of its position and the hearing is not closed until each party has completely presented their case.

The most important aspect of any proceeding, whether it is a court case or an arbitration hearing, is the decision and award. The purpose of the decision is to leave the parties with a solution based on the relevant factors. The typical time span of thirty days is given to the arbitrator to decide and render his decision. The power of the arbitrator ends with his decision. The arbitrator has no power to enforce the award, this is left to the parties and if necessary the courts. No changes may be made unless both parties agree to reopen the case or under some condition that shows that the decision was not properly made. The conditions for the appeals will be discussed later.

Arbitration is not a cost-free hearing. There are the arbitrator's fee (if any), recording costs, hearing room costs and the normal expenses for travel and lodging of the arbitrator. The arbitrator will, under AAA rules, serve two days at no cost to the parties. After the two day period, the arbitrator will be compensated at a rate that has been previously agreed upon. In the case where the parties fail to establish a rate, the AAA will determine the appropriate rate for compensation. Half of the total cost of the hearing will normally be assessed to each party unless only one

party requests a transcript; then they will bear the full costs of the court recorder and transcript preparation.

The basis for the AAA administration of arbitration cases comes from the Rules. The right to arbitrate can come only from the law, the contract or mutual agreement. The complete rules are given in Appendix A and will be discussed further with the issues that are commonly evaluated for arbitration.

CHAPTER 4 ARBITRATION ISSUES

Any discussion of arbitration will typically show that some people strongly support arbitration, others are against it and many have no idea what you are talking about. To discuss advantages and disadvantages of a topic there must be a baseline from which to contrast and compare. Obviously, in the case of arbitration, the baseline for comparison is the court system and the judicial system. The improper aspect of using the court system for comparison is that it is not necessarily a perfect system, but rather the "other" choice when comparing third party decisions that are binding on the participants. Arbitration could also be compared to mediation, mini-trials, review boards and to tailored contract claim review processes which are beyond the intended scope of the discussion. However, these alternatives are not necessarily binding nor are they as frequently encountered.

The basic background of arbitration and some of the underlying issues have been discussed briefly in earlier sections. The following sections will present the issues that frequently become problems for arbitration versus litigation discussions. Most of this discussion will follow along with the AAA rules and procedures.

The difficulty with presenting advantages and disadvantages in legal matters becomes evident in the following pages. The distinction between what is an advantage for one is not automatically a disadvantage for the other, nor can you present "crisp" details for either side of an argument. Most authors that write about arbitration versus litigation will hedge their discussion by including a statement to the effect that both sides have advantages and it is left to the reader to select the appropriate forum for settling disputes. The statement is not without merit as the reader will quickly discover.

4.1 The Adversary Relationship

Arbitration gets philosophical support from many segments of society. However, in construction the general attitude of support comes from the contractors, while the majority of the owners are not in favor of the process. The opposing attitudes may have some practical base. Contractors are often the claiming party and would like to get a quick ruling and award since the moneies held by the owner are often operating funds and profits. The owners on the other hand are not always compelled to settle issues quickly because they have the financial advantage of receiving interest payments on the funds that have not been released to the claiming party. The appearance of cooperation and

purported non-adversary relationship of arbitration proceedings are attractive on the surface, but quickly disappear when the issue of payment is considered.

Another factor that is recognized universally is the aspect of contract control and risk distribution. The owner controls both of these items at the conceptual and development stage of the contract. Therefore, the owner has the power to determine the methods and procedural requirements for processing claims. The owner also has the power to determine the distribution of risk in the contract clauses. Changed conditions, escalation clauses and differing site conditions clauses, when properly prepared, can affect the distribution of risk into a more or less equitable arrangement.

Even with additional contract preparation and cooperation of both parties, the process of litigation through courts or arbitration will remain an adversary relationship. Arbitration may leave the parties with a slightly better relationship, but it still has to be classified as adversarial. The interests of the parties are simply not in complete alignment that would permit a truly amicable agreement.

4.2 Selection of Arbitrators

The one factor that can have a great deal of impact to

a case in arbitration is the arbitrator(s). One of the initial steps after filing for arbitration is picking acceptable arbitrators. Both parties would desire to have a person deciding the issues that could relate to their viewpoint of the case. Better yet if the arbitrator is sympathetic. Others have argued that it is better to choose an arbitrator whose experience is not aligned with your particular area. The reasoning here is that if you can convince this person that the case has merit, their opinion may influence the other panel members in making a decision. This is more of a strategy than factual problems of selecting an arbitrator, but it is a major consideration in arbitration similar to selecting the proper jury in litigation.

The qualifications of someone to become an arbitrator can best be described as covering the full range from just knowledgeable to expert. Demonstrated experience or expertise is not mandatory for acceptance. If adequate knowledge of the industry or expertise can be indicated, the person is likely to be an acceptable arbitrator. In order for a person to become an arbitrator for the AAA, they submit an application to the AAA. The AAA will review the applicant's qualifications and notify the applicant if they have been accepted or not. Unlike applicants for labor arbitration, who must have substantial experience in labor relations as well as experience with arbitrating prior to acceptance, requirements for applicants in construction are not as

stringent. This remains to be a problem with construction arbitration with the AAA. The screening process is relatively new. An additional problem noted by AAA administrators is a top heavy list of lawyers. Few contractors, engineers or architects are available as construction arbitrators. One theory proposed for explaining this apparent deficiency is that because of frequent business relations and professional ethics, many contractors, engineers and architects are unwilling to sit in judgement of fellow practitioners. Although the root of the problem may lie with the lack of remuneration for their efforts.

The construction panel data sheet is a relatively simple standardized form. The amount of information requested on the form is essentially a brief resume and a description of construction related experience. The greatest drawback to using such a simple format is the inability for potential users of arbitration to make an intelligent choice. It may also slow any attempt by the AAA to verify applicant data. Unless the party selecting an arbitrator knows of someone that has had a prior experience with the arbitrator, little information can be gained from the application information outside of background qualifications. However, the AAA only submits qualified names to the parties. They try to match experience and backgrounds to the particular dispute. The experience and background format tends to produce an educated, if not expert, panel or arbitrator.

In the case of compulsory arbitration, there may not be a wide choice of arbitrators. There are several ways that this may occur. States that have enacted mandatory arbitration of construction disputes have established fixed panels that serve appointed terms in office. This has the outward advantage of continuity on the panel. Since arbitration decisions may or may not be written, a full time panel will give fairly consistent decisions. However, at the same time the "mix" of the panel could present some problems if there is a built-in bias. One comment toward this respect involved an established highway construction panel that was extremely lenient toward claims involving time extensions. In general, they were disposed toward awarding all time extensions requested. This is not exactly a disastrous situation but it could definitely, in time, undermine job site authority on time extensions.

A second method is for the panel to be selected from a list, similar to the AAA method of maintaining a list of arbitrators. This would then entail selection of a specific panel for each case that comes to arbitration and procedures similar to AAA could be instituted. The members could be reappointed to the list at intervals or the list may be permanent if the arbitrators are voluntary. This eliminates most bias problems but may produce the problems of nonuniform decisions and a lack of continuity.

Generally, when an arbitration list or pool is limited or fixed, industry groups will select or appoint members to assure representation that is sympathetic toward their particular segment of the industry. In public construction arbitration, the contracting community selects names for the list (or a single person for appointment) and the agency involved will select an equal number and possibly another branch of the state government will select names as well. This list becomes the "pool" of names from which parties then select arbitrators for the hearing.

One issue that has been brought up in the selection of fixed panels and pools is that some members of a group may not have had a chance to participate in the selection of representatives. Usually for contractors, the eligible group for selecting names to the list of arbitrators were those that had contracts with the state during a certain time period prior to the date for selection. This effectively eliminates other contractors, who for various reasons, may not be currently working on state contracts. Those contractors that begin contracts after the initial selection period are then eligible to participate in selection of arbitrators to the panel after some panelist terms have expired.

If the system is one that has a pool of names to select from, the state then has to add an administrative capability

to maintain the service. A procedure must also be established to determine qualifications of applicants and applications must be reviewed prior to certifying arbitrators. Terms of appointment, qualifications and other administrative issues can be fully developed by the statute enabling arbitration or some details may need to be developed after a trial period.

4.3 Arbitrators as Experts

In a civil court proceeding the problem of training and educating the lay jury becomes a difficult problem in the complex situations of construction. Terminology, technology and industry practice are seldom common knowledge to a jury. The common scenario of a construction delay, that is supported by Critical Path Method (CPM) construction schedules, requires a mini-seminar on scheduling techniques before the first shred of evidence is introduced. Arbitrators that are familiar with the construction process will, in most cases, be familiar with scheduling techniques and therefore do not need a crash course in Critical Path scheduling. This is the purpose for selecting and certifying arbitrators based on their qualifications. This is an advantage to the extent that some time is saved. In the cases where manipulation of a schedule is involved, the knowledge of the arbitrator may hinder progress rather than aid settlement.

The worst possible scenario, when considering an arbitrator as an expert, would be the case where after the arbitration has started the parties discover that the arbitrator may not be as well versed in a topic as everyone had initially believed. The relative merit of an arbitrator being knowledgeable then becomes a difficult problem and may prolong the hearing time. The prolongation will be necessary since no one was probably prepared to explain a specific topic in great detail. Of course there are some areas where only a true expert can sufficiently comprehend the problems. However, the overall aspect of presenting a claim to a knowledgeable arbitrator or panel is appealing by itself when compared to making a presentation to an audience that is unfamiliar with the material.

4.4 Power of the Arbitrator

In conjunction with the discussion above it should be emphasized that in an arbitration proceeding, the arbitrator acts as both the judge and the jury. The conduct of an arbitrator is governed by AAA Tribunal Rules for cases that are administered by the AAA. Otherwise the arbitrator only need be concerned with items that may vacate the decision. Typically, such issues are past associations with any of the parties or in some cases current relationships, any financial or personal interest in the result of the arbitration and any bias that may affect the case. The extent of their

personal involvement includes not only the parties involved in the dispute but any other family relationship that might prejudice the arbitrator. Bias must be shown as real and evident in the decision, not simply implied.

The arbitrator is the judge in determining what evidence is allowable, and how it can be presented. The formal rules of evidence, procedure and practice are not present in an arbitration hearing. The agreement may cover some basic ground rules for evidence but in general the arbitrator can allow whatever evidence he desires into the hearing. The arbitrator is expected to weigh the evidence presented as to merit and applicability. This is of great importance because one of the few grounds that can be brought to overturn an arbitration decision is not allowing evidence into the case that could impact the decision. Other procedural rules also determined by the arbitrator in the role of judge include, the amount of pretrial discovery that will be permitted, issuing of subpoenas and postponements of hearings. Postponement may become a problem in complex or large cases because the hearings in arbitration are not required to be continuous and schedule conflicts of the parties may drag the hearing out over a long period of time involving very few days of actual hearing, just as in litigation.

The arbitrator acts as the jury in weighing relative merits of factual information presented and identification

of who should be responsible for various errors. With all the data given, the arbitrator has to decide on an award or no award. There is no conclusive data that shows that arbitrators merely divide the claimed amount in half and use that as the basis for award. There are many critics that claim this to be true but there is no evidence to support these claims. In reality, there may be little that can be done to even check for trends in this area unless a fixed arbitration panel is used and many details of the cases are tracked for analysis.

4.5 Subpoena Power

The subpoena power of the arbitrator is used to compel witnesses to appear at the hearing and to produce documentary evidence the arbitrator deems important to the case. In some jurisdictions the legal counsel of record may also have limited power to issue subpoenas. Subpoenas may be necessary at times but excessive use will delay the proceeding. If witnesses do not appear after subpoena, the courts must be brought in to enforce the subpoena which will again delay the hearing, just as in normal litigation.

In addition to witnesses, subpoenas may be issued to obtain records and documents that are not made available but are necessary evidence. Discovery in arbitration is examined further in another section but is limited in most arbitration systems.

4.6 Courts and Arbitration

Although arbitration is touted as a cure-all by supporters, the courts often play a major role in arbitration. The ironic part of arbitration is the issue of enforcement. The parties that desired to avoid the waiting line at the courtroom and formalities of the court must seek out the court for enforcing subpoenas that are ignored and for enforcement of an award if the party that is the "loser" is recalcitrant in payment.

Another common issue that brings the parties into the court is whether or not a specific problem can be arbitrated. This is a problem that can take time to decide for some issues. The broadly written arbitration agreements or contract clauses are generally interpreted to cover all issues, but a narrowly drafted clause will limit the issues that can be arbitrated. The arbitrability issue can be outlined as follows (30):

Arbitrable Issues

1. Proper method for initiating arbitration.
2. Ambiguous language on the issue of arbitrability.
3. Fraud in inducement of the contract as a whole.
4. Conduct of the parties. (have they waived the right to arbitrate)

5. Time of filing the request for arbitration.
6. Delays in taking action to arbitrate.

Legal Issues

1. Tortuous breach of duty when arbitration clause relates to disagreements over terms, performance, breach and interpretation of the contract.
2. Questions regarding the legality of the contract.
3. Questions of public policy
4. Fraud in the inducement of the contract.
5. Disputes that involve purely legal issues where only disputes involving findings of fact are to be submitted to arbitration.

These are representative of how the courts view the issue of arbitrability but that does not mean that they will determine arbitration is called for under any of the situations listed. Only a case by case determination may be done.

4.7 Consolidation of Proceedings

Consolidation is the merging of two or more arbitrations into a single hearing. This may involve a multiple party issue where all issues and contract interpretation are essentially the same and generating from the same project or the same parties involved in two separate but related arbi-

tration hearings. It would seem advantageous to combine the proceedings, but in general this is not done in arbitration, even though separate proceedings could eventually come out with inconsistent results. A typical problem is where the owner has included an arbitration statute with the prime contractor but failed to include a similar clause with the architect. The prime contractor files for arbitration because of delays caused by shop drawing approvals from the architect but the owner usually cannot join the architect to the arbitration since the contract with the architect did not provide for arbitration, not to mention consolidation. As a result, the owner's only recourse is to sue the architect for recovery.

There are substantial arguments to both sides of consolidation. Those in favor will present the following as reasons to support arbitration consolidation (16):

1. Consistent awards in separate but related disputes
2. Avoids duplication of effort
3. Saves time and money if duplicity is removed.

The opponents of consolidation argue that the following support avoiding consolidation in arbitration (16):

1. Increased complexity with additional parties

2. Delays ultimate resolution of the dispute

3. Hinders the primary parties from resolving their dispute in a timely manner

The arguments for and against consolidation are easily understood, but neither conclusively clear up the problem.

4.8 Discovery in Arbitration

Discovery is a device of civil litigation for disclosure of facts, titles, documents and other items of information that are the exclusive possession one party or another. Most aspects of discovery were discussed in the litigation section in Chapter 2.

Lawyers are tempted to make arbitration as regulated and uniform as the courts. Much of this influence exists now in labor arbitration, where decisions are published and are acceptable as evidence of interpretation in other disputes on a similar theory of precedence that is carried over from English law. Part of the reason that arbitration has survived is precisely because of the lack of regulation and formalism. Uniformity of precedence may be needed in some instances, but construction cases tend to be very unique in most aspects. If all arbitrations became as regulated as the court, it would loose in resolution speed and simply become an ad-hoc court.

Discovery rules, when imposed on arbitration, delays the process. The arbitrator, as a knowledgeable individual, allows for a hearing without the necessity of discovery. This suggests the arbitrator has the knowledge and experience to know what is fact, valid documents or hearsay evidence as well as what is necessary and sufficient for determination of the case. Discovery is early in the litigation process and the court will be there to regulate and administrate the discovery exchange. In arbitration, when the case is at an equivalent stage of maturity, the arbitrator may not yet be selected. If the arbitrator has been selected, he may not wish to be subjected to the administration of a discovery procedure or even be sufficiently knowledgeable of this process to assure proper execution. If court supervision of arbitration discovery is used, the privacy aspect of arbitration is lost, the court may in effect guide the dispute and shape the issues which reduces the capacity of the arbitrator in these instances. Permitting prearbitration discovery may also provide an opportunity for fishing expeditions and allow the parties to engage in drawn out prehearing examinations.

An alternative to the formal discovery process is the prehearing conference. A prehearing conference may be requested by the parties or if this is a AAA hearing, the case administrator may call for a prehearing conference. Prehearing conferences are particularly helpful when a large

and complex case is involved. Some of the issues that can be settled at a prehearing conference include; extent of document discovery needed if any, is direct witness testimony necessary or will sworn affidavits be acceptable, witness lists, and schedules of hearings. The prehearing conference is intended to be an administrative session to clearly establish the operating procedures and establish contact with the parties.

4.9 Privacy

This may be the single most important advantage of arbitration and the least arguable. The arbitration proceeding may not have any permanent written records or written decisions. Transcripts of testimony and hearings are not mandatory. The AAA suggests that this is an effective way to reduce the cost of arbitration. When a transcript is involved in arbitration, only the parties involved receive copies. The other obvious advantage for the contractor is that there is no chance of any "trade secrets", like a special pavement reconstruction process, becoming a permanent part of the legal record. In addition to so called "trade secrets", balance sheets and other financial information about the parties involved in arbitration are not made public since there is no permanent record. Company reputations are also at stake in a claim and airing a dispute in a public forum may create problems with other business associ-

ates. Issues in disputes may or may not harm a company reputation but again where there is no record of the proceedings reputation is a neutral issue.

In the public arena, the right to information, through the Freedom of Information acts, may make arbitration settlements public domain. Some states, utilizing arbitration, have had a few inquires of this nature but have managed to keep the majority of the record private. The AAA is a private nonprofit organization and the implications of arbitrations that have been administered by this organization for public entities has not been fully developed with respect to release of public agency arbitrations.

4.10 Cost

Litigation is considered to be an expensive proposition and usually lives up to its reputation. The costs of lawyers, experts, depositions, mailing, court fees, travel, lodging and subsistence all add up during the time it takes to get in the front door of the courtroom. These could be considered direct costs of a claim. Some of the indirect cost that is not accounted for above would include the time of key personnel away from their primary activities and responsibilities required for depositions, strategy planning, preparation and review.

The relatively bleak picture of litigation costs will

not improve a great deal for arbitration of a large claim. Attorney fees remain about the same since preparation methods and time will not change significantly. There are some savings involved because of the decreased discovery. The bottom line is that the cost of arbitration may be lower than litigation only if both parties are in agreement on all but a limited number of issues. Smaller claims have less involved issues but the costs of preparation may outweigh the advantages of the arbitration costs.

Delays in starting arbitration hearings may also affect the total cost. Arbitration can be delayed by various challenges to the authority of the arbitrator, arbitrability of the claim and other maneuvers that extend time and therefore costs. In relatively smaller claims the speed and simplicity of arbitration may be cost effective since few contractors would spend the capital necessary to recover a \$25,000 claim in court, but if arbitration were an alternative they may be able to recover the claim.

4.11 Advantages and Disadvantages

It is almost impossible to enumerate items that are particularly advantageous to either arbitration and litigation. They can be rather loosely segregated into the following lists. Cost does not appear on the list since it is not considered to be significantly different in any formal procedure. The relative order of an item is not an indication of a weighted ranking.

Advantages

1. Privacy of hearings (records are seldomly detailed)
2. Small claim amounts can be settled quickly
3. Small claims can be heard effectively (limited issues)
4. Industrial or related experience of arbitrator(s)
(knowledgeable in the industry)
5. Flexibility of proceedings (location, times, procedures)
6. Speed (depends greatly on the parties)
7. Arbitration is binding (claim is settled with no further delays for appeals)

Disadvantages

1. Arbitration is binding (generally no appeal mechanism if arbitrators violate the norm)
2. Possible inconsistent decisions (without consolidation)
3. No precedence process for basis of future actions (decisions may appear to be inconsistent when compared to each other)
4. Limited discovery may not reveal all facts needed (discovery is limited in arbitration, if permitted at all)

5. Preparation time is reduced (due to speed of hearings there is less preparation time available if documentation was not adequate prior to filing of demand for arbitration)
6. Trial by a jury is waived (courts are generally favorable towards upholding arbitration clauses)

The above list clearly demonstrates that what arbitration gains for some areas, it loses in others and a clear recommendation that arbitration is better than litigation cannot be made. The only clear advantage goes to the owner, but it is not in terms of arbitration or litigation. The owner will generally tailor the formulation of the contract and, therefore, controls the distribution of risk as well as the method of settlement.

CHAPTER 5 CURRENT HIGHWAY ARBITRATION STATUTES

Several states have adopted arbitration into their statutes for settlement of highway and other construction related disputes. Not all, however, have elected to use the procedure. Review of the procedures and practices of several states will provide a picture of what is currently being done in highway claims arbitration. Table 5.1 is a breakdown of states that have arbitration statutes covering highway construction.

Iowa, Kansas, Minnesota and Mississippi laws allow for discretionary use of arbitration. Arizona and Delaware allow arbitration under the administration of the American Arbitration Association. Arizona has just recently joined the ranks of arbitration states and was included because of the system they selected. Rhode Island arbitration is limited to public building construction. Only Florida and California maintained summary statements and statistics on settlements of all arbitration hearings held to date. Interpretation of the results should be kept open and not taken as positive proof of how all arbitration systems will run or should run.

Table 5.1 Summary of Highway Arbitration States

ARBITRATION STATES (c)		
ARBITRATION ONLY	DUAL SYSTEM LIMITED SIZE CLAIM	DUAL SYSTEM FORUM CHOICE
California (a)	Florida (a) \$100,000 limit Fixed term panel	Iowa (b)
Delaware AAA administrates	Mississippi (b)	Kansas (b)
Minnesota (b)	Arizona (a) \$100,000 limit AAA administrates	North Dakota (a) Arbitrators selected from pool.

(a) Detailed review in report.

(b) Discretionary and not used.

(c) Rhode Island only allows arbitration on building projects.

5.1 California

The California arbitration system has received substantial use since it was implemented. The most recent modification to the state code became effective January 1, 1982. Some of the changes made were substantial but in general the new legislation followed existing lines with respect to arbitration of highway contracts.

5.1.1 State Contract Act

The initial arbitration procedures in California became

effective on January 1, 1979 as the result of an Executive Order mandating state agencies to provide for arbitration of disputes in contracts. The Order included the right for existing contracts to use arbitration as well as claims that were pending litigation. The Executive Order did not repeal any existing contract claim review procedures currently in force within the various public contracting agencies directly affected by the legislation. Contractors were specifically required to exhaust all administrative procedures available before filing for arbitration. The completion of all levels of administrative review prevents contractors from short circuiting the existing administrative review and perhaps obtaining a decision from arbitration prior to having all the facts necessary for determination.

The General Services, Transportation and Water Resources Departments were directed to establish a uniform set of regulations to implement the provisions of the act. The procedures to be developed included, but were not limited to the following:

1. The method of initiating arbitration.
2. The place of hearing based on convenience of the parties.
3. Procedures for selecting arbitrators.
4. The form and content of any pleading.
5. Procedure for conducting hearings.
6. The providing of experts to assist the arbitrator in the event the assistance is needed.

7. The content of the award.

8. Simplified procedures for claims of \$50,000 or less.

Section 10240.8 of the Act defines the decision requirements. Decisions from arbitration hearings, under this legislation, need to be supported by substantial evidence and, in writing, contain the basis for the decision, findings of fact and conclusions of law.

Unlike many other jurisdictions, California has specifically allowed for joinder of parties to the proceeding. The intent is to prevent inconsistent decisions that could result from two separate actions on the same issues.

Discovery is also permitted under the California system. This is an important consideration in light of Federal Highway Administration requirements for participation in construction claims. Discovery includes all items permissible in a normal court proceeding which would include: depositions, inspection and copying of writings, interrogatories and admissions. The express inclusion of discovery is in part necessary to ensure that decisions are supported by fact and are evidenced in writing.

California has also specifically outlined what costs are recoverable through arbitration. The cost of conducting the hearing includes the filing fee, costs of the arbitrator, reporter fees and hearing room rental. In addition,

under certain circumstances, attorney fees of the claiming party can also be awarded based on prior offers of settlement of the claim.

5.1.2 Public Works Contract Arbitration Committee

This committee is the governing committee for certification of arbitrators and as such they are charged with establishing the standards and qualifications for certifying arbitrators.

Each of the seven committee members serves a four year term and are appointed from various areas. Three members are public members that receive appointment through the governor. The public members nominated are required to have ten years experience in a general contracting firm engaged in public works construction. The Directors of the Departments of General Services, Water Resources and Transportation each appoints a member to the committee. Their appointments must be agency employees from their respective agencies and serve at the pleasure of their appointing Director. The final member of the seven member committee is the Director of the Office of Administrative Hearings who is a nonvoting member.

The Office of Administrative Hearings provides the administrative services, facilities and fiscal support to the system and recovers costs through the filing fees

charged for arbitration. Unlike many arbitration systems, the California hearings have only one arbitrator, regardless of the size of claim or complexity of the issues.

5.1.3 Performance

Perhaps "performance" is a misnomer in a discussion of arbitration, but one of the highly touted advantages of arbitration is that it saves money. The Department of Transportation has had over \$11.4 million in claims that have been presented to arbitration or have been settled without a hearing (arbitration had been initiated). Out of the total claimed, the State has had to pay out roughly \$4.4 million. The \$4.4 million includes some legal fees and interest payments on claims since, under certain circumstances, these are awarded by the arbitrator to the claiming party. This does not include data for the other public agencies engaged in arbitration such as, the Office of the State Architect. The "bottom line" shows approximately a 38% payout ratio. Although this is substantially higher than the 20% payout ratio prior to the enactment of the arbitration system, the increased pay out is inconclusive alone. There is no way to measure what costs would have been incurred had the cases been taken to a court. Moreover, it is difficult to attribute the rise to arbitration since the increase may be due to other economic or political factors.

One item that is a definite advantage to California arbitration is the time it requires for settlement. Hearings last four to five days for the average claim. Major claims have lasted as long as thirty days and smaller claims have been finished in a single hearing. This is important to consider in light of the fact that discovery is permitted for arbitration. Overall, from notice to arbitrate to decision, the process typically takes less than one year. It is doubtful if a court could be as expeditious. At one time the court system in California was working with a four to five year backlog of cases.

Table 5.2 California Claims Distribution

AMOUNT CLAIMED	NUMBER OF CLAIMS FILED
less than	
\$100,000	32
\$200,000	7
\$300,000	4
\$400,000	5
\$500,000	2
over	
\$500,000	7
TOTAL	57

A significant item is the distribution of the claimed amounts that have been brought to arbitration. The ranges below have been selected arbitrarily with the exception of the \$100,000 dollar range which represents the upper limit

of claim amounts in states that have put an upper limit on claims eligible for arbitration. The number of claims filed for less than \$100,000 represents the largest single group of claims and comprise greater than 50% of all claims. The remaining groups are fairly balanced. The group that represents over \$500,000 includes three claims in excess of one million dollars. The largest single claim in that group was for \$3 million.

5.1.4 Comments

There is an escape clause from arbitration in California. If both parties agree in writing to waive the provisions of arbitration, the contractor can then pursue the claim through litigation in the appropriate court. Although no records suggest that contractors or the agencies have opted for this, it does provide for an alternative.

The California system, although very complex for arbitration, does present a very clear picture of how public administrators may protect the state coffers from arbitrary decisions by an arbitrator.

5.2 North Dakota

The North Dakota Century Code (NDCC) establishes the authority for contractors and the state to arbitrate all disputes in highway construction contracts. Specifically the sections 24-02-26 through 24-02-33 deal with highway

construction. In addition, all of Chapter 32-29 of the NDCC is dedicated to arbitration for other areas of disputes but sections of this chapter are incorporated by reference in sections 24-02-26 to 33.

5.2.1 Statute Requirements

Section 24-02-26 requires that all controversies arising out of construction or repair contracts, that cannot be settled, be submitted to arbitration. Arbitration demands must be in writing and include the name of the arbitrator desired by the party submitting the demand for arbitration. The written demand must list all controversies and claims desired to be settled. The written demand is served to the opposing party who then has ten days to make their selection of an arbitrator. The third arbitrator is then named by the two thus chosen. If they fail to reach agreement in five days then either party may apply to the court for appointment of the third. If the opposing party does not select an arbitrator in the proper time the moving party may request appointment through the judge of the district court where the project is located for the appointment of the two additional arbitrators. The selection procedure also requires that when the two parties do select two arbitrators, the two selected have five days to name the third.

The demand for arbitration is conditional upon several factors or precedent conditions. The contractor must state

that the contract has been or will be completed on a stated day. This notice must not be given less than ten days from the stated date. The commissioner may then inspect the work to assure that timely completion is possible or else specify what additional work is necessary for completion. Time of completion is an arbitable matter in North Dakota as well as whether or not additional work has been completed as specified by the commissioner. Further arbitration is permissible on items of work that the arbitration panel decides are not finished at the time of the original hearing. These controversies must be submitted to the same panel of arbitrators on five days notice for further determination. Payment for claims arbitrated against the commissioner can be collected through a court proceeding if the the commissioner fails to pay the amount determined by the board.

5.2.2 Arbitrator Pool

This is the main area where the North Dakota arbitration system takes a minor change from other arbitration systems. Rather than having a complete listing of arbitrators, the North Dakota system establishes a fixed fifteen member arbitrator pool. The names that are included in the pool are generated by appointment by the governor. The governor selects the names from lists generated by Society of Professional Engineers, Associated General Contractors of North Dakota and the Highway Commissioner. No more than five

names may be selected from any of these three lists of names. Members of the panel serve two year terms. Vacancies in the pool of names are filled through the same procedure as the original selections were made. The full text of this selection method is in section 24-02-27 NDCC.

5.2.3 Comments

North Dakota experiences with arbitration have not been overly successful from the state highway department's point of view. The primary concern was a perceived lack of procedural adequacy. Decisions of the panels have been lacking in documentation and there is no method for establishing a record of decisions. The other main point of criticism is that too often the panels have decided issues that appear contrary to the facts. The department has attempted to have the system appealed or modified, to date unsuccessfully.

5.3 Florida

Arbitration in Florida is a method for resolving minor contract disputes that total up to \$100,000. The philosophy, for arbitrating with a limit, is that under a litigation situation a claim of \$100,000 is economically impossible to litigate and a method for reviewing these claims would be beneficial to the contracting community. The following is a description of the basic legislation that controls the arbitration board in Florida.

5.3.1 Florida Statute

The statute for arbitration in Florida highway construction claims has been modified several times since it was first implemented. This is important to recognize, since the experience of the board, contractors and the department are being used to aid in developing and fine tuning the system. The information is paraphrased from the 1984 Florida Statutes, Section 19, Section 337.185.

The purpose as stated is to facilitate the prompt settlement of claims for additional compensation arising out of contracts between the department and the various contractors with whom it transacts business.

Contractual claims up to an aggregate amount of \$100,000 per contract that cannot be resolved by the department and the contractor shall be arbitrated. Arbitration can only be implemented after the project has been accepted by the department. A court of law cannot consider the dispute until the process established by the statute has been exhausted.

The board is composed of three members. One is appointed by the head of the highway department. One is appointed by the construction companies under contract with the department of highways. The final member is selected by the two previously chosen. In the case of a conflict of

interest with a board member and one of the parties to the arbitration, the other two members may select an alternate member for that hearing. Each board member is appointed for a two year term and may not serve more than three consecutive terms. The administrator is a board member elected by the board who has the responsibility of being the custodian of their records.

Hearings can be requested by either the department or the contractor. The hearing, once requested, must be held within 45 days of the request. If, by the board's decision, a third party is necessary to resolve a dispute, the board may dismiss the claim, which may then be filed in the appropriate court.

If the contract between the parties specifically defines the rights, duties and liabilities of the parties with respect to any matter in the dispute, the board is only empowered to decide the issues within that framework. The board is required to hand down the decision within 60 days of the hearing. A simple majority of the board constitutes an acceptable decision.

Board members are not compensated, with the exception of the chairman who may receive an honorarium, as the board administrator, of up to \$125 for each day the board is in session and each day engaged in activities related to the meetings. Alternate members may receive an honorarium of up

to \$100 per day for each hearing they participate in. There is also an allowance of \$3000 per year to cover clerical and other administrative costs.

Fee schedules are determined by the board, not to exceed \$500 per claim, and the board may apportion the fee, recording costs and transcript preparation costs among the parties in accordance with the board's findings of liabilities.

5.3.2 Performance

Since the original legislation in Florida only allowed claims under \$50,000 to be arbitrated, the dollar volume appears to be fairly low. To date approximately \$2.8 million in claims have been filed. Settlement awards have been roughly \$1.49 million for a 52% payout ratio. Although the ratio seems fairly high there is no conclusive evidence in the records that a claim will automatically receive payment of 52%. In some case the panel awarded full amounts claimed and in others they did not allow recovery of any funds.

Looking at the last 29 cases, fifteen (15) involved claims for additional time. Within the time extension group, nine (9) claims involved requests for time alone. This has been recognized as a significant problem in arbitration cases in Florida and the panel is moving toward tightening the award of additional contract time.

5.3.3 Comments

The arbitration system of Florida is a modified arbitration system that is significantly different from the others in several ways. The first important distinction to make is that the arbitration panel in Florida is a fixed board rather than a fixed panel list or pool of arbitrators. There may be some advantages to having fixed panel members. Continuity in the decisions for a fixed time period does not replace the precedence system of the judicial system but it does have some merit when compared to a random selection of arbitrators. This advantage may quickly become a disadvantage if the board becomes biased in one or more areas. Earlier boards were not particularly stringent in evaluating time extension claims. Most cases were decided in favor of awarding time extensions to contractors. The current board is trying to be more analytical in allowing time extensions. Florida has had a considerable number of cases decided and a minimal set of records have been kept on the results. The panel meets regularly at six week intervals or as close to that as possible. Normally during the course of a day they will not only hear cases but also decide on cases and prepare decisions. In an effort to fine tune the system, Florida has had to revise their arbitration statutes several times. Part of the fine tuning involved renumeration of the panel members, who at one time received no compensation for their services.

5.4 Arizona

Arizona is the only state among the four being reviewed that relies on the American Arbitration Association for claims administration and the Construction Industry Rules. The arbitration system is initiated through the specification special provisions. The following discussion centers around the arbitration provisions that have been in force since August 1984.

5.4.1 Claims

Subsection 105.17 establishes the requirements for contractors that are submitting claims for additional compensation. The first requirement is that the notice of claim be submitted promptly in writing as soon as possible after the condition that caused the claim occurs and prior to beginning work on the items involved in the bases of the claim. Failure of notification waives any claim for additional compensation. At this juncture the contractor is required to track all costs associated with the claim and all records kept must be made available to the State Engineer for review. At the same time, the paragraph requires that the contractor must continue with project work. Essentially, no claims may proceed beyond the filing stage until the project is complete.

If the amount of the dispute is \$100,000 or less, the State Engineer has 45 days to make a decision. If the amount of the claim is over \$100,000, then the time allowance is extended to 60 days for a decision. Both time periods relate to the time of receipt of the contractor's claim notice. The State Engineer's decision is final unless the contractor desires to compel further legal action within the time prescribed by the law. In claims in excess of \$100,000, the contractor can commence legal action. Claims under \$100,000 are eligible for arbitration only. Section 105.18 continues to explain that a claim in excess of \$100,000 may be arbitrated, but the maximum settlement that may be ordered from arbitration is \$100,000 and any amount in excess of this upper limit amount is forfeited.

5.4.2 Arbitration

All hearings for arbitration are designated to be held in Phoenix, Arizona. The hearings are subject to the Construction Industry Rules of the AAA.

Arbitration is initiated by the contractor filing a Demand for Arbitration with the AAA and a copy served to the State Engineer. The Demand must be served within 30 days of the final determination of the State Engineer. The arbitration can only include issues that the State Engineer has made a determination on and no new issues may be introduced in the proceeding.

The determination of the claim amount may not include liquidated damages already assessed or take into account any requested time extensions. The specification also specifically identifies that only one arbitrator will serve to decide the issues. Rather than mailing identical lists to both parties and waiting reply, the Arizona specification provides that the parties meet with a list of arbitrators furnished by the AAA. Each party then alternately strikes names from the list until only a single name remains. If the remaining person cannot serve as arbitrator for the dispute, the last two stricken names become eligible. The last stricken name is the first alternative and the second to last name the second alternative. The meeting for selection of an arbitrator must be held within 10 days after receiving the lists from the AAA. If the parties fail to select an arbitrator the procedure defaults to selection by the AAA. Each party assumes the cost of preparation for arbitration and costs assessed by the AAA are equally shared by the two parties.

5.4.3 Comments

Although Arizona has not had substantial experience in arbitrating construction disputes, the system they have established seems to short cut some of the time consuming procedures of the AAA rules, such as the meeting for selection of an arbitrator rather than mailing lists and waiting

to see which arbitrator has been selected. The location of arbitration is also predetermined which resolves another issue from administrative delays or possible dispute.

The allowable amount of payment from arbitration cannot exceed \$100,000, but does not prevent a contractor with a claim for \$115,000 or \$250,000 from filing a demand for arbitration. The only difficulty here is that the contractor will lose amounts in excess of the maximum allowed. When a contractor has problems with documentation of a larger claim or perhaps the case is not strong enough to hold well in litigation, the arbitration alternative may be the best.

Another advantage for this system is that there is no expense necessary for maintaining a supply of qualified arbitrators. The AAA as administrator supplies and certifies arbitrators. One problem that has been noticed in Arizona is the difficulty of obtaining engineers, architects and contractors that are certified as arbitrators. The factor that has been suspect for this particular problem is the general theory of reluctance on the part of practicing professionals to sit in judgement of fellow practitioners.

5.5 Discretionary States

Iowa has a nonbinding arbitration method whereby the department has the discretionary power of electing to arbi-

trate a claim. The system has had little activity in the past few years. The procedural requirements are established within the specifications. Either party to the arbitration may reject the decision. The most recent use resulted in acceptance of the decision. Otherwise the Iowa procedure is fairly uniform with respect to operational procedures.

Minnesota has an arbitration statute but has not developed the contract language to include arbitration in their contracts. The decision not to use the arbitration procedure is essentially based on an unfavorable opinion of arbitration or a preference for litigation.

Kansas requires that a full staff review be held prior to initiating arbitration or submitting a claim to court. The final decision for arbitration rests with the Department and they have only elected to use arbitration on a single case. The one time the method was used, several procedural problems were encountered and possibly biased the result. The specific language for arbitration is included in the Special Provisions to the contract. There is a short time limitation for filing a claim in Kansas. If a claim is denied the contractor has 30 days in which to file for arbitration. The three member panel can pass on all compensation issues but are specifically prevented from interpreting quality of work issues, quality of materials or modify any contract terms.

Mississippi is included as a discretionary state based on claims that are in excess of \$25,000. At \$25,000 and under the claim is arbitrated and the system does receive a fairly regular use. Over the limit the discretionary part of the system offers a choice between going into General Arbitration or to the court system. The General Arbitration has received only one case in the last few years. Some deficiencies were commented on with regard to the smaller arbitration board when they failed to follow specifications or other documents that would normally weigh heavily in court in evaluating actions or reasons for dismissing a claim. A full staff (chain of authority) review is required for all claims submitted.

5.6 Federal Participation in Construction Claims

The ability for a state government to pay for an unexpected event, such as a contract claim, is often subject to the participation level of the Federal Highway Administration. However, a state highway agency is not automatically eligible to receive Federal funds for claims payments. Interpretation of what was or was not eligible for Federal participation generated enough confusion that 23-CFR-Part 635 was amended in 1984. The following is taken in part from the notice of proposed rules published in the Federal Register (Vol. 49, No. 60).

The most obvious requirement is that the contract must have been a Federal-aid project. A project fully funded by state funds would not receive any help for claims payment from FHWA. Federal-aid projects are generally administered by a state highway organization, who contracts with a private contractor for performance. The costs of construction are then prorated between the state and FHWA. The FHWA does not have any control during the execution of the contract and as such treats each claim on an individual basis.

The FHWA will only participate in claims that are supportable, reasonable and in conformance with the principles of contract law. This is to prevent State Highway Agencies from simply agreeing to settlement when their pro rata share would be minimal. Supporting documentation should accompany a request for participation by the FHWA. Documentation should include information as to the legal and contractual basis for the claim, factual data and cost data supporting the amount of the claim, an audit of the actual costs incurred by the contractor and a memorandum, outlining the evaluation, by the State agency counsel. If the case has been determined in a court, the documentation provided for that hearing should cover most of the FHWA requirements. However, in the case of arbitration, documentation may be more difficult to produce. California would normally have most of the data because of the discovery allowed in arbitration. Other States either limit discovery or are silent on the topic.

The FHWA will not participate in interest payments on claims unless the interest accrued from a State appeal that had prior approval of the FHWA. Interest is not considered to be a cost of construction. When a State agency files against a contractor to recover funds, the FHWA will also be refunded in the appropriate pro rata share for the contract that was in force. The funds generated this way are credited to the project where the claim arose.

The bottom line is simply that the FHWA will continue to make a case by case determination of when they will participate in payment of a claim with a state agency. Although this seems a little awkward for administration, the wide variety of circumstances that generate claims prevents a clear cut delineation of acceptable causes for participation. If a State agency is clearly aware of what the FHWA requires for participation, there should not be too many questions, regardless of the forum that initially decided the case.

5.7 Indiana Statutes

Indiana, as noted earlier, does permit arbitration in contracts and unlike Texas does not exclude construction contracts. However, there is no specific language within the code to specifically permit the Indiana Department of

Highways to arbitrate construction contract disputes. The Department of Administration has used arbitration for labor disputes. This may be an indication that there is a favorable climate for developing the necessary enabling legislation to allow IDOH to use some format of arbitration in settling construction contract disputes. In brief the following discussion will outline the Indiana arbitration statute which has been adopted as the result of the Uniform Arbitration Act.

5.7.1 Indiana Arbitration Statutes

Arbitration is covered under the Indiana laws in Civil Procedure-Special Proceedings 34-4-1-1, 34-4-1-3 and 34-4-1-18. The remaining coverage of arbitration is under the Uniform Arbitration Act in 34-4-2. The Uniform Arbitration Act is, like most uniform standards, a general act that is very open to interpretation.

The sections in 34-4-1 are general in nature and describe who may arbitrate, execution of bonds to perform the award rendered and proceedings on invalidation or sustaining awards. The sections in 34-4-2 are the main set of rules that govern arbitration under the state codes and since they have been developed for generic arbitrations they do not specifically mention construction arbitration.

The code does specifically address the issues of

proceedings to stay or compel arbitration and rely heavily on the court system in this regard. The only specific reference to selection of arbitrators is by court appointment, but references in other areas do indicate that the parties should select a mutually agreeable arbitrator or arbitrators. Hearing locations and time are determined by the arbitrator as well as adjournment times. Parties are permitted to submit all evidence material to the controversy regardless of admissibility under rule of evidence.

Confirmation of award is a judicial procedure. After the arbitration proceeding has finished, a successful party can file an application for confirmation of the award with the proper court, but not before ninety days after mailing of the award. The court, after review, will enter a judgement consistent with the award and have the decision docketed as if the judgement were rendered by the court.

The code continues to discuss methods of vacating the award or modifying the award. Court applications, jurisdiction and venue are also discussed. The act is not retroactive in Indiana and only applies to agreements made after August 18, 1969. The purpose of the arbitration code selected is such that arbitration hearings in Indiana are consistent with other states that have adopted similar legislation.

It is safe to state that the Indiana Department of Highways will have a great deal of difficulty using the existing statute as a guideline for arbitration. A more specific set of regulations would be desirable that could incorporate some of the existing statute language. Additional discussion of an arbitration system for the Indiana Department of Highways is included in the final chapter of this report.

CHAPTER 6 CURRENT IDOH CLAIMS PROCESS

Prior to making suggestions with respect to the final settlement procedure for claims the current IDOH review process needs to be identified. The current IDOH contract claim review process is a fairly common chain of command process that starts at the field level and progresses to the central office. This section will also review several areas that have been identified as deficient or potential problem areas by both IDOH personnel and contractors' personnel.

In addition to identifying the IDOH claims process, a basic discussion will be included on the procedures of surrounding states. The intention of this review is to preliminarily show what systems multi-state contractors have experience with.

6.1 Background

The appropriate background research to this section was performed as a Joint Highway Research Project (JHRP-83-8) by Karen D. Berg (9). The report summarizes a survey of the areas that both the contractors and the IDOH personnel feel are problem areas with respect to potential claims. Significant remarks and response levels will be reviewed prior to

discussion of the internal procedures of the review process. Both groups felt that an increase in the number of disputes that eventually will end up as claims should be expected. This is an important attitude to keep in mind. Both sides may be concentrating more on documenting claims than concentrating on resolution, in which case you will get more claims not quick resolution.

The next three items were listed as areas where IDOH personnel encountered frequent project disputes: time extensions, specification interpretations and changed work (a changed condition). Both groups agreed that disputes about acceptable quality and quantity disputes were most frequently settled at the project site. Other areas that were noted frequently were as follows:

- Workday Charges
- Personality Conflicts
- Plan Intent Interpretation

Another question requested that the respondents indicate how they felt that disputes have changed. The responses indicated that more disputes were ending up in the Central Office, more disputes (claims) involved time extensions, and again the number of claims has increased.

The final questions that are of interest from the survey were in regard to improving the relationship between the contractors and the IDOH and what changes should be made in

the system. The responses here are of particular interest because they may indicate more areas that should be investigated before changing the entire dispute resolution process.

- Tighter prequalification requirements.
- More decision capacity at lower levels.
- Increased authority at the lower levels.
- Speed up the paper flow.
- Require more formal documentation of requested changes.
- Allow more flexibility on the District level for settling time extension disputes.

These comments should be kept in mind while reviewing the current dispute administration process. Some of the responses noted above were made by IDOH personnel and others were made by contractors. They give a fairly good indication of where the current system is perceived to be causing problems.

The above factors are not restricted to Indiana. A risk and liability conference held in 1979 at Scottsdale, Arizona, specifically polled the participants with regard to identifying important items related to contract risk. Changes in the work, changed conditions, delayed dispute resolution, delayed payment on contract and extras, and change order negotiations were among the items identified as most important (22).

6.2 Current Resolution Process

Indiana does not specifically discuss procedures for contract claims in the contract, special provisions or specifications. The procedure that is followed works for all changes and extra work agreements.

Although most disputes are settled at the project level, not all can be settled because of monetary limitations or inability of project level personnel to negotiate with full assurance of approval. This section will review both the process and limitations that are imposed on the various levels. As an aid to understanding the review process, Figure 6.1 was prepared to demonstrate the chain-of-command currently used by IDOH for processing changes. The following sections describe the authority and review capability of the various IDOH divisions.

6.3 Project Personnel

The Project Engineer/Supervisor is the primary site representative and has a myriad of paperwork and responsibilities, but overall lacks a great deal of authority. Basically, all field decisions of any importance need to be authorized by another level of authority.

Project Supervisors cannot issue time extensions, their ability to grant extra work is severely limited and they must always seek a higher level of authority to gain approval.

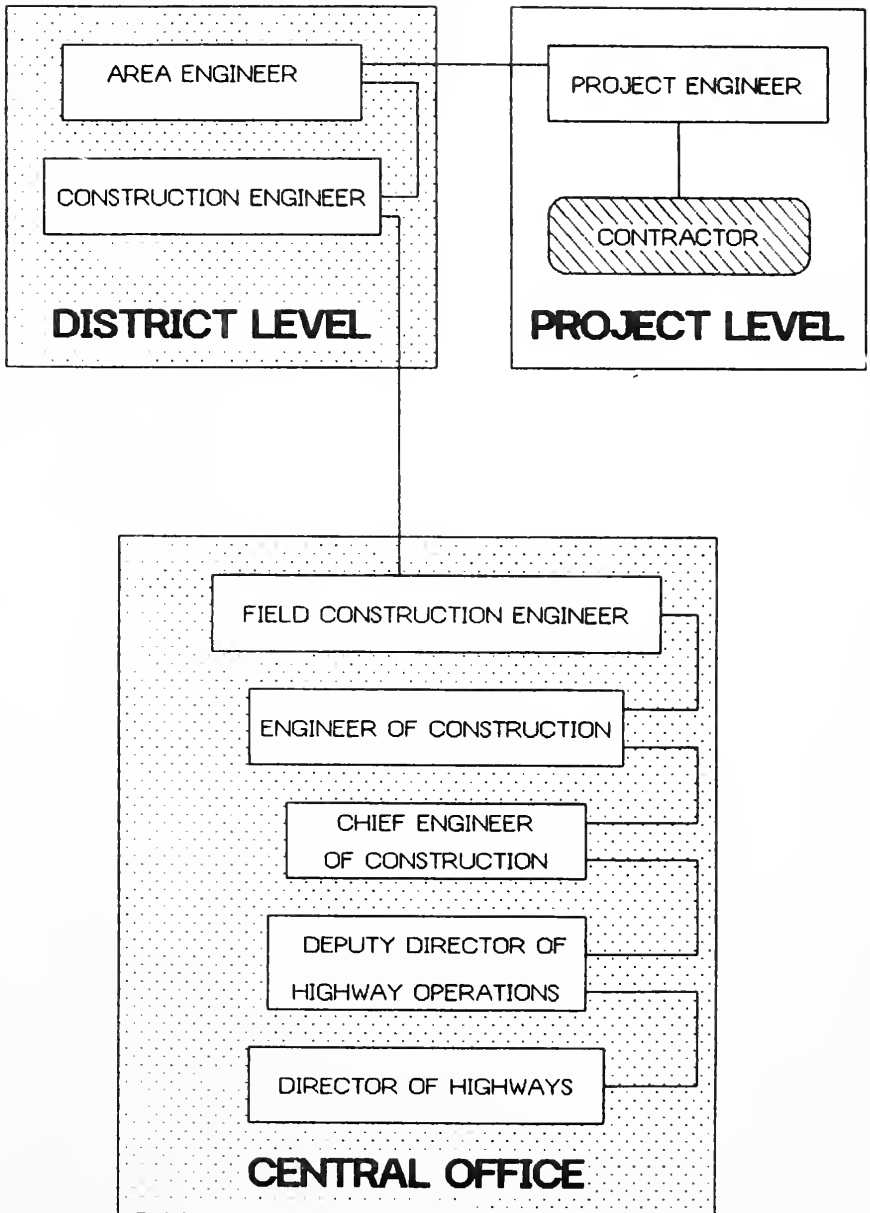


Figure 6.1 Current Resolution Process

There is no monetary authority granted to the project level personnel. A contractor that relies on a verbal approval for a change item is aware that another level of authority could possibly invalidate the change. The instructions to field personnel are stated in very clear terms, that site personnel can direct the contractor in what to do, but not how to do it, as follows:

The Project Engineer/Supervisor should not exceed the provisions of the specifications in dictating the methods of doing work. ... In simple language, the State Personnel are Inspectors and not Foremen and can tell the contractor what to do, and the Contractor will determine how to do it.

While this may be only a minor point, in determining what to do, an Inspector or Project Engineer may in fact be dictating schedule, the same schedule by which the State is deducting liquidated damages for failure to complete in the contract time. This is a critical problem, since the only schedule requested of the contractor may be generated from a basic bar chart of controlling work items. Bar charts, although effective for visual interpretations, have consistently been determined by the courts as being too vague to control prosecution and progress on a project. With liberal interpretation of what happens in the field, it is possible to see that field personnel may be making poor decisions because of the format of the schedule and not because a lack of capability.

The Field Manual also states that in cases of discrepancies, figured dimensions control over scaled, drawings govern over specifications, and special provisions govern over both the plans and specifications. In litigation the hierarchy of evidence is not always the same and in general they will tend to conform with the specific controlling the general. In fact there are cases to show where specifications will control drawings and the specifications may prevail over notes on the drawings (30).

The purpose of discussing these two items here is to show that the project level personnel have a great deal of impact on the interpretation of the contract documents and in the prosecution of the work. These same individuals cannot for the most part, back up their directions with personal authority, but must defer to another level for approvals. This is somewhat at odds with the contractor's field arrangement where the superintendent of the project is capable of making many decisions that affect the prosecution of the project as well as changes.

The two most important documents that the field personnel handle are the IC 115, Extra Work Agreement, and the IC 626, Change In Plans. The IC 115 is used when extra work is necessary on an item that was included in the original contract and there are existing unit prices to estimate the value of the revision. Technically, no work can proceed on

the extra work until approval has been received from the Central Office. These forms must be signed by an authorized representative of the contractor and be notarized. But this form must first pass through the District Engineer's office and then to the Engineer of Construction's office. Neither of these documents will be filed unless the Project Engineer/Supervisor has agreed to the change. The contractor can force the issue by requesting the change in writing and submit it to the Project Engineer/Supervisor, who then reviews internal documents of the project record and other appropriate documents. After reviewing all the data, the Project Engineer writes an interpretative decision based on the facts and submits all the documentation to the Area Engineer at the District Office. This effectively leaves the issue at the same stage with the exception being that the contractor is now on record as claiming additional time or payment. However, the important issue is that regardless of the final opinions attached, the project is continuing and the contractor is on record for filing a claim.

6.4 District Level

There are two levels of review at the District Level on paper. These levels are the Area Engineer and the District Construction Engineer. The initial level is the Area Engineer who is responsible for examining the initial request from the contractor for any problems not settled by

the Project Engineer/Supervisor. However, when the request involves design revisions, time extensions or additional funds, the Area Engineer has no authority for approval. In these cases the Area Engineer reviews the facts and issues an opinion. If the contractor is not satisfied, he must appeal the Area Engineer's decision to the District Construction Engineer. The Area Engineer is by definition above restricted to interpretive items that the project personnel have presented.

The District Construction Engineer has a limited amount of authority on both IC 115 and IC 626 documents. The approval authority is \$7,000 and \$10,000 respectively for single line items on the change orders. If, however, the limits are acceptable, but the change is a cumulative change that increases or decreases the contract by more than 20%, then the approval is reviewed and a recommendation is attached. All subsequent changes on the contract must then be submitted to the Central Office. As was the case with Project Engineers/Supervisors the District Engineer cannot approve any change order of either type if it includes an increase in time as part of the change. These are only approved by the Director. Other types of changes that the District Level cannot approve are as follows:

- Revisions of alignment in geometric design.
- Any structural section change above subbase.

- Addition, deletion or relocation of bridges or other structures which would affect the functional scope and intent of approved design.
- Deviations from planned access control.
- Alterations to intent or scope of contract or character of work.
- Alterations of specifications, special provisions, or other contract requirements including approved provisions for maintaining traffic.

All approved district change orders are subject to review by the Division of Construction in the Central Office.

6.5 Central Office

Several levels of authority exist at the Central Office depending on the nature of the claim. The initial recipient of a claim in the Central Office is the Field Construction Engineer. The Field Construction Engineer has no established level of authority for approving any claims from the contractor. The primary responsibility of the Field Construction Engineer is to receive the material submitted from all parties and add an additional recommendation to be forwarded to the Engineer of Construction.

The next level is the Engineer of Construction. The limitations for monetary approval for this are \$12,000 for the IC 115 and \$20,000 for the IC 626. Again, the limitations exist with respect to time extensions and changes in design. Monetary limits for this level are slightly higher depending on the particular document being reviewed. If the

contractor is not satisfied with the decision at this junction, they must then appeal to the Chief, Division of Construction.

The Chief, Division of Construction has approval limits of \$25,000 and \$50,000 for the IC 115 and IC 626 respectively. Any dispute exceeding these limits must be forwarded to the Deputy Director of Operations. In addition, any decision of the Chief can be appealed by the contractor to the Deputy Director.

The Deputy Director has greater latitude in approval of IC 115 and IC 626 claims. These limits are \$75,000 and \$150,000 per line item. Even at this level of monetary authority, any approval requiring a design change or time extension needs to be approved by the Director of Highways. If, however, the request includes design changes the changes must first be evaluated through the Design Division.

The Director has the approval authority for any level of revised funding as well as time changes and design revisions. Therefore, if a claim is not resolved at this junction in the process, litigation is the only recourse for the contractor or the State.

6.6 Evaluation

The Indiana Department of Highways process is similar to many other state highway department resolution processes

with chain of command approaches. The items most frequently noted in the sample survey bears out the problems of chain of command administration. The following sections will take a look at possible causes for the problem areas identified in the preceding sections.

6.6.1 More disputes going to the Central Office

One of the trends that was noted was in regard to more disputes were being sent to the Central Office. This is easily understood because the Central Office not only has the most internal levels of authority but also the significant monetary approval levels are within this layer. This is not a problem so long as the process by which the disputes are handled result in timely decisions.

6.6.2 Decisions are slow from Central Office

The comment on the amount time required for decisions will always be significant when multiple layers of authority are required. The paper chase alone consumes a great deal of time and with multiple project responsibilities and other duties, it is apparent how some decisions may take a temporary back seat to other issues.

6.6.3 District personnel should grant time extensions

The issue of granting time extensions should be clarified for all involved. The Director is the only source for

time extension reviews. This indicates that in a dispute that includes time as part of the request regardless of the dollar amount the entire chain of command is invoked. The philosophy behind this must stem from the fact that all initial bidders were on an even basis of time at the bid letting and if a time extension were granted then perhaps the other bidders should have had an equal amount of time for estimating their performance. While on the surface this is a logical basis for having stringent control on time extensions, it does not address the problem of determining the impact of acceleration to the work by the contractor who feels that in all probability a time extension, if granted, may take too long to procure. Various types of delays can occur on a construction project and one of them that is a compensable type of delay is constructive acceleration. Compounded within this particular problem is the schedule for construction. What is currently used is a "controlling item" type of schedule that is used primarily as a measure of funds flow for payments.

There does not seem to be any requirements for updating schedules or schedule approval. In fact there are no specific scheduling requirements. This may be a major source of conflicts and possibly a source of claims. The facts are that a court will generally rule that a bar or Gantt chart is insufficient in depth and clarity for showing interrelationships of activities. Therefore, a major

contract item, 5% of the contract price, may or may not be critical in terms of completing a particular project. This is a serious problem if the State should not grant a time extension to an item that is not a major contract item but is critical in terms of project completion. Another advantage of requiring a specific format of schedule is that both parties are aware of where the work is phased and what the contractor has based his bid on for completion. The appropriate scheduling technique is CPM. The contractor may in fact be basing the "progress schedule" on a CPM schedule, but again these progress schedules only require major activities be shown. However, the contractor may in fact then be justified in continuing a request for reimbursement for constructive acceleration after a request for a time extension has been rejected if the work was performed as directed. The primary result here is that perhaps insufficient information exists in the current approval system to make proper determination of time extensions regardless of who has the authority to grant time extensions. The types of time extensions, cases where time extension is unquestionable, could be granted by lower echelon personnel, if they are properly documented and clearly due to the contractor. This would be an acceptable solution if the the District personnel would not abuse the authority.

There is a temptation to include arbitration as simply another layer in the chain of command. Arbitration is a

final review and should not be implemented as a temporary check point to see if both parties are simply not willing to negotiate. If arbitration is not a binding process for the parties, then there is no reason for implementation.

6.7 Surrounding State Procedures

Contractors that perform work for the IDOH are not always Indiana contractors. Many out-of-state contractors are prequalified in Indiana to bid on IDOH contracts. The intent for reviewing surrounding states is to provide a sample of the resolution processes encountered by contractors in adjacent states.

Ohio provides for suits against the state within two years of the cause of the action or any shorter period. The state has established a Court of Claims that has jurisdiction over any recommendation from the Bureau of Construction that results in the contractor filing a suit. This assumes that any negotiations after the adverse recommendation have failed but does not prevent continuing negotiation.

Illinois requires that an informal review by the department staff is necessary. If the issue is not resolved, the final decision is the responsibility of the Secretary of Transportation. In Illinois the Court of Claims has jurisdiction over all claims filed against the state. The court has a panel of three judges. Claims must

be filed within 60 days after final payment and all other legal or administrative remedies need to be exhausted. The Court of Claims decision has no appeal mechanism.

The Kentucky system has final review by the Commissioner of Highways preceded by staff review and two committee reviews. The Circuit Court in Franklin is the named court of jurisdiction where the claim must be filed prior to one year from contract completion expiration. Complete review through all steps of the process are not necessary before suit is filed.

Michigan requires that the final review of any claim is by the Director of State Highways and may be appealed to the Court of Claims. Notice of intent to sue must be filed within one year of the accrual of the claim and the actual suit must be filed within three years. Cases are heard by a single judge without a jury and decisions may be appealed.

These are not unlike Indiana in that most require that a full departmental review is held prior to allowing the claim to proceed to court. However, this says little about the internal procedures of the states and is beyond the scope intended here. The methodologies of Wisconsin, Ohio, Illinois and Kentucky are similarly reviewed in Berg's study (9).

CHAPTER 7 RECOMMENDATIONS

Arbitration has been presented from the historical development aspect, the current procedures used by highway agencies and the private sector procedures of the American Arbitration Association. Private and public arbitration have some distinct differences in concept and flexibility. Hopefully, these have been adequately discussed and clarified in the text. In addition, a review of some of the internal processes and problems of arbitration was also presented.

7.1 Recommendations

The most direct and obvious recommendation to be made is that in all circumstances the IDOH should encourage negotiation based on principles and not on a concept of 'winning or losing.' It should be noted that the current system delays many decisions, but overall it seems to function adequately.

The primary difficulty that could be hindering negotiations is that the Field Engineer is negotiating with contractor personnel that have significantly more power in their respective positions. There are current efforts to

revise the authority levels in the IDOH construction contract review process that will give more decision capability closer to the source of the problem. Since the revised authority scheme is only in the review process, it is not possible to review the proposal at this particular time. These revised authority levels should be given full support and implementation.

The source of problems still remains at the project level and serious evaluation of an expedited negotiation procedure for major claims should be considered. Early negotiations can settle many disputes that are potential claims at an early stage and at a lower long term cost.

If the negotiating sessions are to be successful, both negotiators must be able to have signatory power for the agreement reached and not be concerned about approval from parties not present or involved in the negotiation. This would require that the value of the claim be estimated prior to negotiation, and that the appropriate level of IDOH personnel be present for the negotiating sessions. Inappropriate negotiators may occur less frequently with revised authority levels under the currently proposed IDOH system.

The directions provided for field employees on negotiating prices for change orders and field direction of work should be reviewed and possibly rewritten to remove ambiguous or misleading statements. Most change order prices can

be handled with existing unit prices but on occasion new rates need to be negotiated. Labor rates are generally known for the start of the project which leaves equipment rates, overhead rates and material. Equipment price lists for performing extra work, not covered by the contract, can be included in the contract documents in the event that extra work is required. Materials can be tracked on an invoice amount. The overhead rate to be applied to extra work can also be specified ahead of time within the contract. Requiring items such as labor rates and equipment prices for changes in the bidding stage removes these items from dispute and establishes a common set of values for all change work items. Field employees can then concentrate on what work is being done and not on how much will the bill be at completion.

There are probably no perfect formulations to prevent field conflicts between the owner and the contractor, but contract documents that equitably divide risk at the beginning of a project or reduce areas of possible conflict will reduce the possibility of a costly claim.

7.2 Recommendation for Mediation

Prior to accepting any particular solution method that relinquishes control to a third party, it would make considerably more sense to work with a process that encourages continued negotiation such as mediation. Although there are

no references to any existing state agency or highway department that has used mediation, it may not involve any additional legislation to provide for a mediated settlement, unless there are difficulties in procuring proper payment for the services through existing payment accounts.

Until a measure of satisfaction can be gained with mediation, the establishment of a permanent record of available mediators would not be desirable. If the method is agreeable to both the contracting community and the IDOH, the establishment of a permanent list of available mediators could be developed and maintained or the mediation services of the American Arbitration Association could be used. If mediation fails to resolve the claim, both parties still have the court system or arbitration to work through for settlement. Mediation can be used before arbitration or the court and would be the most easily implemented.

7.3 Recommendation for Arbitration

If there is inadequate support to continue mediated settlements, additional legislation would be desirable for the IDOH to engage in arbitration. The initial formulation of the legislation should probably be such that arbitration is available on a consensus basis rather than a mandatory settlement procedure. This may be the desired format for the final arrangement since not all disputes are best presented nor determined by an arbitration procedure. The

disadvantage to this alternative is that in most cases people are more comfortable with methods and procedures that are familiar and few cases may be selected for arbitration. The danger of testing a system such as arbitration is that if problems exist in the original draft, the final system may never be developed.

There are several areas of concern for arbitration in the public sector that should be fully evaluated prior to initiating an arbitration system. The first area that needs to be discussed is the overall goal for using arbitration. In particular, the discussion on this issue should center around two issues. Will the system be providing a needed service and could this service be better addressed through another channel? Construction claims are expensive to resolve and only larger claims will be taken to court unless there is some substantial legal point that can be made by a smaller claim. Therefore, in most circumstances a need exists to provide a legal alternative or third party settlement of smaller claims. The variation in arbitration systems indicates that there are two predominate theories of what size claims are applicable for arbitration. These also tend to be tied to the overall goal of using arbitration. The limited scope arbitration, where a top limit is placed on claims that can be paid out of an arbitration proceeding, can have the objective of providing a forum for small contract disputes and therefore providing a service to smaller

contract claims. This also could be the only available forum for smaller contractors working for public agencies that cannot afford to litigate a claim. Unlimited arbitration is a uniform procedure for all claims regardless of dollar amount or contractor size, but it also requires a more regulated system for control.

The issue of legislation was identified in several areas of the discussion. Several needs must be addressed for developing the final format for the arbitration system. If arbitration is to be accepted by the groups that are using the system, then they need to be included in the formulation of the legislation. If possible, someone familiar with arbitration should be consulted during the development. Perhaps the AAA could be consulted in this regard. Other interested groups would be the contracting groups that work with the IDOH, the administrative department that would be in charge of administration of the proceedings and certifying qualified arbitrators, and possibly other state agencies that are involved in construction that would be interested in having the system available for use on other claims. Staff and funding could be shared between departments or agencies that will use the services.

Certification of the arbitrators is another area that will demand close scrutiny before the system should be accepted. A high standard of qualification will reduce the

available pool of arbitrators, while a low standard of acceptable qualifications will open up the arbitrator pool to less knowledgeable people. Within this context is the problem of engaging active professionals in all construction related areas that will be required to judge acts or omissions of fellow practitioners. Impartial arbitrators in this respect may be difficult to obtain.

Another issue that has created some negative opinions of arbitration is when decisions do not follow commonly accepted principles of contract law. To counteract this problem, lawyers could be required as one panel member or at a minimum decisions could be reviewed for legal requirements. A careful balance must be maintained between protection of the legal interests and operational simplicity in the system.

The issue of Federal participation in any claim is still on a case by case basis with no guarantees for any claim resolution. There is a concern here that, although the arbitration panel has deliberated on the facts of the case, there may not be a record of how the case was actually decided. It is important that proper documentation of the claim and hearing be available for review in the case of Federal participation or at least access to proper backup information as requested. The central issue in this argument is the necessity of having a court recorder and

transcript of the hearing. If this is a requirement, the costs of the court recorder and transcript preparation should be shared equally between the parties.

The preceding issue involves another issue to a certain extent. Discovery is not typically permitted in arbitration unless specific guidelines or language to this affect is included in the legislation or procedures. It might possibly be better to examine the formulation of a more exacting standard for submission of changes and claims rather than permitting extensive discovery procedures. Exactly what type of information to include in the submission is not within the scope of discussion here, but the concept is brought forward as an alternative to allowing discovery. Limited discovery is also possible, but as much can be accomplished in the prehearing conference as limited discovery will permit.

Another method to reduce the issues in arbitration is a prehearing meeting where the parties, along with the arbitrators, could reduce the generalities of the submission statement into a list of issues and facts that are the central focus of the dispute. However, a prehearing meeting will also consume time and will have cost associated with it as well. These may be negligible if the prehearing conference would encourage the parties to resume negotiations.

A serious concern for arbitration is unwarranted claims that are submitted or claims that cannot be based on facts from the project records. Spurious claims can be prevented if a penalty is available for the arbitrator. One method to penalize those that submit unwarranted claims is to have the arbitrator charge all hearing costs, preparation costs and attorney fees of the defendant to the plaintiff. This penalty provision in the legislation should also be available for the contractor in the case where a claim should have never occurred. Overall, this consideration is to prevent abusive of the arbitration hearings and provide a punitive measure for those that attempt to file unwarranted claims.

7.4 Conclusions

There are a short series of conclusions that can be made from the study and may or may not impact arbitration.

The first and foremost conclusion is that an outside party should never select the claims settlement method for a group as diverse as a public highway agency. Those that will have to use the system on a daily basis must be convinced that what they are using is the best alternative available to them.

A closer look at authority levels of negotiators should always occur to ensure the fact that the person negotiating for the public agency has the requisite authority to back up

the settlement agreement. Expedited negotiation should be considered when the claim leaves the first level of authority for the public agency. Further reviews may only be cursory reviews and serve only to aggravate the problem. Direct negotiation between the contractor and appropriate agency personnel should be initiated as soon as possible.

A more detailed section on claim submission requirements in the specifications would speed up the process. Items to be included in the submission should be spelled out in detail. Requiring a detailed submission should reduce the number of unwarranted claims and improve the review process by providing more information toward justifying the decision on the claim. Another area that should be reviewed is schedule submission and approvals. A greater amount of information may help produce better job-site decisions with respect to time impacts and costs of changes.

An arbitration system for resolution of IDOH construction claims needs to be jointly developed between the Department, consultants, designers and constructors. A preliminary configuration of the system could be proposed along the following ideas.

Negotiation is the most effective way to resolve claims but there are circumstances when negotiations break down. Negotiations often breakdown for reasons not associated to the issues of the claim. Mediation can be used to encourage

a more realistic evaluation of not only the issues but also of the alternatives for not settling the claim.

Arbitration, at least initially, should be on a discretionary basis. The most flexibility for selection of a forum is when the parties have a choice of process. The discretionary states identified earlier have not utilized the process to full advantage or have not permitted the process to mature. As a pragmatic estimate the claims, submitted to arbitration should not exceed \$150,000 in value. This reflects the final approval value of the chain of command with the exception of the Director. The claim should be eligible to go to arbitration as soon as it passes a level of authority capable of settling the claim. The \$150,000 limit does not remove the Director's authority on claims in excess of this amount. Larger claims would require the Director's review before submission to arbitration or litigation. This preserves the current review process for major claims and expedites settlement of smaller claims.

7.5 Recommendations for Further Study

Further study should be continued by the Indiana Department of Highways with respect to implementing arbitration for construction claims. This should be a joint effort, where possible, with other interested State departments involved in public works construction and associated industry groups. A slow and thorough investigation of the

mechanics of the desired system would be more beneficial than accepting the first draft proposal. Test cases should be built into the development to check on procedural requirements and problem areas. A realistic time table for development should be established along with the intended program goals.

The final area for further study would be to develop a model arbitration system for public agencies in construction. Existing model arbitration codes such as the Uniform Arbitration Act do not meet the requirements of agencies involved with the construction process. This would have to account for many possible variations on a particular scheme, but at least it would insure that a uniform approach to arbitration would be taken by all states desiring to implement arbitration or mediation.

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APPENDICES

Appendix A American Arbitration Association Arbitration Rules

Construction Industry Arbitration Rules

AMERICAN CONSULTING
ENGINEERS COUNCIL

AMERICAN INSTITUTE OF ARCHITECTS

AMERICAN SOCIETY OF
CIVIL ENGINEERS

AMERICAN SOCIETY OF
LANDSCAPE ARCHITECTS

AMERICAN SUBCONTRACTORS
ASSOCIATION

ASSOCIATED BUILDERS AND
CONTRACTORS, INC.

ASSOCIATED GENERAL CONTRACTORS

ASSOCIATED SPECIALTY
CONTRACTORS, INC.

CONSTRUCTION SPECIFICATIONS
INSTITUTE

NATIONAL ASSOCIATION OF
HOME BUILDERS

NATIONAL SOCIETY OF
PROFESSIONAL ENGINEERS



American
Arbitration
Association

*As amended
and in effect
February 1, 1984*

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Construction Industry Arbitration Rules

1. Agreement of Parties

The parties shall be deemed to have made these Rules a part of their arbitration agreement whenever they have provided for arbitration under the Construction Industry Arbitration Rules. These Rules and any amendment thereof shall apply in the form obtaining at the time the arbitration is initiated.

2. Name of Tribunal

Any Tribunal constituted by the parties for the settlement of their dispute under these Rules shall be called the Construction Industry Arbitration Tribunal, hereinafter called the Tribunal.

3. Administrator

When parties agree to arbitrate under these Rules, or when they provide for arbitration by the American Arbitration Association, hereinafter called AAA, and an arbitration is initiated hereunder, they thereby constitute AAA the administrator of the arbitration. The authority and duties of the administrator are prescribed in the agreement of the parties and in these Rules.

4. Delegation of Duties

The duties of the AAA under these Rules may be carried out through Tribunal Administrators, or such other officers or committees as the AAA may direct.

5. National Panel of Arbitrators

In cooperation with the National Construction Industry Arbitration Committee, the AAA shall establish and maintain a National Panel of Construction Arbitrators, hereinafter called the Panel, and shall appoint an arbitrator or arbitrators therefrom as hereinafter provided. A neutral arbitrator selected by mutual choice of both parties or their appointees, or appointed by the AAA, is hereinafter called the arbitrator, whereas an arbitrator selected unilaterally by one party is hereinafter called the party-appointed arbitrator. The term arbitrator may hereinafter be used to refer to one arbitrator or to a Tribunal of multiple arbitrators.

6. Office of Tribunal

The general office of a Tribunal is the headquarters of the AAA, which may, however, assign the ad-

ministration of an arbitration to any of its Regional Offices.

7. Initiation under an Arbitration Provision in a Contract

Arbitration under an arbitration provision in a contract shall be initiated in the following manner:

The initiating party shall, within the time specified by the contract, if any, file with the other party a notice of an intention to arbitrate (Demand), which notice shall contain a statement setting forth the nature of the dispute, the amount involved, and the remedy sought; and shall file three copies of said notice with any Regional Office of the AAA, together with three copies of the arbitration provisions of the contract and the appropriate filing fee as provided in Section 48 hereunder.

The AAA shall give notice of such filing to the other party. A party upon whom the demand for arbitration is made may file an answering statement in duplicate with the AAA within seven days after notice from the AAA, simultaneously sending a copy to the other party. If a monetary claim is made in the answer the appropriate administrative fee provided in the Fee Schedule shall be forwarded to the AAA with the answer. If no answer is filed within the stated time, it will be treated as a denial of the claim. Failure to file an answer shall not operate to delay the arbitration.

Unless the AAA in its discretion determines otherwise, the Expedited Procedures of Construction Arbitration shall be applied in any case where the total claim of any party does not exceed \$15,000, exclusive of interest and arbitration costs. Parties may also agree to the Expedited Procedures in cases involving claims in excess of \$15,000. The Expedited Procedures shall be applied as described in Sections 54 through 58 of these Rules.

8. Change of Claim or Counterclaim

After filing of the claim or counterclaim, if either party desires to make any new or different claim or counterclaim, same shall be made in writing and filed with the AAA, and a copy thereof shall be mailed to the other party who shall have a period of seven days from the date of such mailing within which to file an answer with the AAA. However, after the arbitrator is appointed no new or different claim or counterclaim may be submitted without the arbitrator's consent.

9. Initiation under a Submission

Parties to any existing dispute may commence an arbitration under these Rules by filing at any Regional Office two copies of a written agreement to arbitrate under these Rules (Submission), signed by the parties. It shall contain a statement of the matter in dispute, the amount of money involved, and the remedy sought, together with the appropriate filing fee as provided in the Fee Schedule.

10. Pre-Hearing Conference and Preliminary Hearing

At the request of the parties or at the discretion of the AAA, a pre-hearing conference with the administrator and the parties or their counsel will be scheduled in appropriate cases to arrange for an exchange of information and the stipulation of uncontested facts so as to expedite the arbitration proceedings.

In large and complex cases, unless the parties agree otherwise, the AAA may schedule a preliminary hearing with the parties and the arbitrator(s) to establish the extent of and schedule for the production of relevant documents and other information, the identification of any witnesses to be called, and a schedule for further hearings to resolve the dispute.

11. Fixing of Locale

The parties may mutually agree on the locale where the arbitration is to be held. If any party requests that the hearing be held in a specific locale and the other party files no objection thereto within seven days after notice of the request is mailed to such party, the locale shall be the one requested. If a party objects to the locale requested by the other party, the AAA shall have power to determine the locale and its decision shall be final and binding.

12. Qualifications of Arbitrator

Any arbitrator appointed pursuant to Section 13 or Section 15 shall be neutral, subject to disqualification for the reasons specified in Section 19. If the agreement of the parties names an arbitrator or specifies any other method of appointing an arbitrator, or if the parties specifically agree in writing, such arbitrator shall not be subject to disqualification for said reasons.

13. Appointment from Panel

If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the fol-

lowing manner: Immediately after the filing of the Demand or Submission, the AAA shall submit simultaneously to each party to the dispute an identical list of names of persons chosen from the Panel. Each party to the dispute shall have seven days from the mailing date in which to cross off any names to which it objects, number the remaining names to indicate the order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree upon any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from other members of the Panel without the submission of any additional lists.

14. Direct Appointment by Parties

If the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed. The notice of appointment, with name and address of such arbitrator, shall be filed with the AAA by the appointing party. Upon the request of any such appointing party, the AAA shall submit a list of members of the Panel from which the party may make the appointment.

If the agreement specifies a period of time within which an arbitrator shall be appointed, and any party fails to make such appointment within that period, the AAA shall make the appointment.

If no period of time is specified in the agreement, the AAA shall notify the parties to make the appointment, and if within seven days after mailing of such notice such arbitrator has not been so appointed, the AAA shall make the appointment.

15. Appointment of Arbitrator by Party-Appointed Arbitrators

If the parties have appointed their party-appointed arbitrators or if either or both of them have been appointed as provided in Section 14, and have authorized such arbitrator to appoint an arbitrator within a specified time and no appointment is made within such time or any agreed extension thereof,

the AAA shall appoint an arbitrator who shall act as Chairperson.

If no period of time is specified for appointment of the third arbitrator and the party-appointed arbitrators do not make the appointment within seven days from the date of the appointment of the last party-appointed arbitrator, the AAA shall appoint the arbitrator who shall act as Chairperson.

If the parties have agreed that their party-appointed arbitrators shall appoint the arbitrator from the Panel, the AAA shall furnish to the party-appointed arbitrators, in the manner prescribed in Section 13, a list selected from the Panel, and the appointment of the arbitrator shall be made as prescribed in such Section.

16. Nationality of Arbitrator in International Arbitration

If one of the parties is a national or resident of a country other than the United States, the arbitrator shall, upon the request of either party, be appointed from among the nationals of a country other than that of any of the parties.

17. Number of Arbitrators

If the arbitration agreement does not specify the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that a greater number of arbitrators be appointed.

18. Notice to Arbitrator of Appointment

Notice of the appointment of the arbitrator, whether mutually appointed by the parties or appointed by the AAA, shall be mailed to the arbitrator by the AAA, together with a copy of these Rules, and the signed acceptance of the arbitrator shall be filed prior to the opening of the first hearing.

19. Disclosure and Challenge Procedure

A person appointed as neutral arbitrator shall disclose to the AAA any circumstances likely to affect his or her impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their counsel. Upon receipt of such information from such arbitrator or other source, the AAA shall communicate such information to the parties and, if it deems it appropriate to do so, to the arbitrator and others. Thereafter, the AAA shall determine whether the arbitrator

should be disqualified and shall inform the parties of its decision, which shall be conclusive.

20. Vacancies

If any arbitrator should resign, die, withdraw, refuse, be disqualified or be unable to perform the duties of office, the AAA shall, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provision of these Rules. In the event of a vacancy in a panel of arbitrators, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise.

21. Time and Place

The arbitrator shall fix the time and place for each hearing. The AAA shall mail to each party notice thereof at least five days in advance, unless the parties by mutual agreement waive such notice or modify the terms thereof.

22. Representation by Counsel

Any party may be represented by counsel. A party intending to be so represented shall notify the other party and the AAA of the name and address of counsel at least three days prior to the date set for the hearing at which counsel is first to appear. When an arbitration is initiated by counsel, or where an attorney replies for the other party, such notice is deemed to have been given.

23. Stenographic Record

The AAA shall make the necessary arrangements for the taking of a stenographic record whenever such record is requested by a party. The requesting party or parties shall pay the cost of such record as provided in Section 50.

24. Interpreter

The AAA shall make the necessary arrangements for the services of an interpreter upon the request of one or both parties, who shall assume the cost of such services.

25. Attendance at Hearings

Persons having a direct interest in the arbitration are entitled to attend hearings. The arbitrator shall otherwise have the power to require the retirement of any witness or witnesses during the testimony of other witnesses. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other persons.

26. Adjournments

The arbitrator may adjourn the hearing, and must take such adjournment when all of the parties agree thereto.

27. Oaths

Before proceeding with the first hearing or with the examination of the file, each arbitrator may take an oath of office, and if required by law, shall do so. The arbitrator may require witnesses to testify under oath administered by any duly qualified person or, if required by law or demanded by either party, shall do so.

28. Majority Decision

Whenever there is more than one arbitrator, all decisions of the arbitrators must be by at least a majority. The award must also be made by at least a majority unless the concurrence of all is expressly required by the arbitration agreement or by law.

29. Order of Proceedings

A hearing shall be opened by the filing of the oath of the arbitrator, where required, and by the recording of the place, time, and date of the hearing, the presence of the arbitrator and parties, and counsel, if any, and by the receipt by the arbitrator of the statement of the claim and answer, if any.

The arbitrator may, at the beginning of the hearing, ask for statements clarifying the issues involved. In some cases, part or all of the above will have been accomplished at the preliminary hearing conducted by the arbitrator(s) pursuant to Section 10.

The complaining party shall then present its claims, proofs and witnesses, who shall submit to questions or other examination. The defending party shall then present its defenses, proofs and witnesses, who shall submit to questions or other examination. The arbitrator may vary this procedure but shall afford full and equal opportunity to the parties for the presentation of any material or relevant proofs.

Exhibits, when offered by either party, may be received in evidence by the arbitrator.

The names and addresses of all witnesses and exhibits in order received shall be made a part of the record.

30. Arbitration in the Absence of a Party or Counsel

Unless the law provides to the contrary, the arbitra-

tion may proceed in the absence of any party or counsel, who, after due notice, fails to be present or fails to obtain an adjournment. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as is deemed necessary for the making of an award.

31. Evidence

The parties may offer such evidence as is pertinent and material to the controversy and shall produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the controversy. An arbitrator authorized by law to subpoena witnesses or documents may do so upon the request of any party, or independently.

The arbitrator shall be the judge of the relevance and the materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent in default or has waived the right to be present.

32. Evidence by Affidavit and Filing of Documents

The arbitrator may receive and consider the evidence of witnesses by affidavit, giving it such weight as seems appropriate after consideration of any objections made to its admission.

All documents not filed with the arbitrator at the hearing, but arranged for at the hearing or subsequently by agreement of the parties, shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded opportunity to examine such documents.

33. Inspection or Investigation

An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall direct the AAA to so advise the parties. The arbitrator shall set the time and the AAA shall notify the parties thereof. Any party who so desires may be present at such inspection or investigation. In the event that one or both parties are not present at the inspection or investigation, the arbitrator shall make a verbal or written report to the parties and afford them an opportunity to comment.

34. Conservation of Property

The arbitrator may issue such orders as may be

deemed necessary to safeguard the property which is the subject matter of the arbitration without prejudice to the rights of the parties or to the final determination of the dispute.

35. Closing of Hearings

The arbitrator shall specifically inquire of the parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies, the arbitrator shall declare the hearings closed and a minute thereof shall be recorded. If briefs are to be filed, the hearings shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. If documents are to be filed as provided for in Section 32 and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be the date of closing the hearing. The time limit within which the arbitrator is required to make an award shall commence to run, in the absence of other agreements by the parties, upon the closing of the hearings.

36. Reopening of Hearings

The hearings may be reopened by the arbitrator at will, or upon application of a party at any time before the award is made. If the reopening of the hearing would prevent the making of the award within the specific time agreed upon by the parties in the contract out of which the controversy has arisen, the matter may not be reopened, unless the parties agree upon the extension of such time limit. When no specific date is fixed in the contract, the arbitrator may reopen the hearings, and the arbitrator shall have thirty days from the closing of the reopened hearings within which to make an award.

37. Waiver of Oral Hearings

The parties may provide, by written agreement, for the waiver of oral hearings. If the parties are unable to agree as to the procedure, the AAA shall specify a fair and equitable procedure.

38. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these Rules has not been complied with and who fails to state an objection thereto in writing, shall be deemed to have waived the right to object.

39. Extensions of Time

The parties may modify any period of time by mutual agreement. The AAA for good cause may

extend any period of time established by these Rules, except the time for making the award. The AAA shall notify the parties of any such extension of time and its reason therefor.

40. Communication with Arbitrator and Serving of Notices

There shall be no communication between the parties and an arbitrator other than at oral hearings. Any other oral or written communications from the parties to the arbitrator shall be directed to the AAA for transmittal to the arbitrator.

Each party to an agreement which provides for arbitration under these Rules shall be deemed to have consented that any papers, notices or process necessary or proper for the initiation or continuation of an arbitration under these Rules and for any court action in connection therewith or for the entry of judgment on any award made thereunder may be served upon such party by mail addressed to such party or its attorney at the last known address or by personal service, within or without the state wherein the arbitration is to be held (whether such party be within or without the United States of America), provided that reasonable opportunity to be heard with regard thereto has been granted such party.

41. Time of Award

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties, or specified by law, not later than thirty days from the date of closing the hearings, or if oral hearings have been waived, from the date of transmitting the final statements and proofs to the arbitrator.

42. Form of Award

The award shall be in writing and shall be signed either by the sole arbitrator or by at least a majority if there be more than one. It shall be executed in the manner required by law.

43. Scope of Award

The arbitrator may grant any remedy or relief which is just and equitable and within the terms of the agreement of the parties. The arbitrator, in the award, shall assess arbitration fees and expenses as provided in Sections 48 and 50 equally or in favor of any party and, in the event any administrative fees or expenses are due the AAA, in favor of the AAA.

44. Award upon Settlement

If the parties settle their dispute during the course of the arbitration, the arbitrator, upon their request, may set forth the terms of the agreed settlement in an award.

45. Delivery of Award to Parties

Parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail by the AAA, addressed to such party at its last known address or to its attorney, or personal service of the award, or the filing of the award in any manner which may be prescribed by law.

46. Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party, furnish to such party, at its expense, certified facsimiles of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration.

47. Applications to Court and Exclusion of Liability

- (a) No judicial proceedings by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.
- (b) Neither the AAA nor any arbitrator in a proceeding under these Rules is a necessary party in judicial proceedings relating to the arbitration.
- (c) Parties to these Rules shall be deemed to have consented that judgment upon the award rendered by the arbitrator(s) may be entered in any Federal or State Court having jurisdiction thereof.
- (d) Neither the AAA nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these Rules.

48. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe an administrative fee schedule and a refund schedule to compensate it for the cost of providing administrative services. The schedule in effect at the time of filing or the time of refund shall be applicable.

The administrative fees shall be advanced by the initiating party or parties in accordance with the administrative fee schedule, subject to final apportionment by the arbitrator in the award.

When a matter is withdrawn or settled, the refund shall be made in accordance with the refund schedule.

The AAA, in the event of extreme hardship on the part of any party, may defer or reduce the administrative fee.

49. Fee When Oral Hearings are Waived

Where all oral hearings are waived under Section 37, the Administrative Fee Schedule shall apply.

50. Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses.

The cost of the stenographic record, if any is made, and all transcripts thereof, shall be prorated equally between the parties ordering copies, unless they shall otherwise agree, and shall be paid for by the responsible parties directly to the reporting agency.

All other expenses of the arbitration, including required traveling and other expenses of the arbitrator and of AAA representatives, and the expenses of any witness or the cost of any proofs produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise, or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.

51. Arbitrator's Fee

Unless the parties agree to terms of compensation, members of the National Panel of Construction Arbitrators will serve without compensation for the first two days of service.

Thereafter, compensation shall be based upon the amount of service involved and the number of hearings. An appropriate daily rate and other arrangements will be discussed by the administrator with the parties and the arbitrator(s). If the parties fail to agree to the terms of compensation, an appropriate rate shall be established by the AAA, and communicated in writing to the parties.

Any arrangement for the compensation of an arbitrator shall be made through the AAA and not directly by the arbitrator with the parties. The terms of compensation of neutral arbitrators on a Tribunal shall be identical.

52. Deposits

The AAA may require the parties to deposit in advance such sums of money as it deems necessary to defray the expense of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance.

53. Interpretation and Application of Rules

The arbitrator shall interpret and apply these Rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of any such Rules, it shall be decided by a majority vote. If that is unobtainable, either an arbitrator or a party may refer the question to the AAA for final decision. All other Rules shall be interpreted and applied by the AAA.

EXPEDITED PROCEDURES

54. Notice by Telephone

The parties shall accept all notices from the AAA by telephone. Such notices by the AAA shall subsequently be confirmed in writing to the parties. Notwithstanding the failure to confirm in writing any notice or objection hereunder, the proceeding shall nonetheless be valid if notice has, in fact, been given by telephone.

55. Appointment and Qualifications of Arbitrators

The AAA shall submit simultaneously to each party to the dispute an identical list of five members of the Construction Arbitration Panel of Arbitrators, from which one arbitrator shall be appointed. Each party shall have the right to strike two names from the list on a peremptory basis. The list is returnable to the AAA within ten days from the date of mailing. If for any reason the appointment cannot be made from the list, the AAA shall have the authority to make the appointment from among other members of the Panel without the submission of additional lists. Such appointment shall be subject to disqualification for the reasons specified in Section 19. The parties shall be given notice by telephone by the AAA of the appointment of the arbitrator. The parties shall notify the AAA, by telephone, within seven days of any objections to the arbitrator appointed. Any objection by a party to such arbitrator shall be confirmed in writing to the AAA with a copy to the other party(ies).

56. Time and Place of Hearing

The arbitrator shall fix the date, time, and place of the hearing. The AAA will notify the parties by telephone, seven days in advance of the hearing date. Formal Notice of Hearing will be sent by the AAA to the parties.

57. The Hearing

Generally, the hearing and presentations of the parties shall be completed within one day. The arbitrator, for good cause shown, may schedule an additional hearing to be held within five days.

58. Time of Award

Unless otherwise agreed to by the parties, the award shall be rendered not later than five business days from the date of the closing of the hearing.

ADMINISTRATIVE FEE SCHEDULE

A filing fee of \$200 will be paid at the time the case is initiated.

The balance of the administrative fee of the AAA is based upon the amount of each claim and counterclaim as disclosed when the claim and counterclaim are filed, and is due and payable prior to the notice of appointment of the neutral arbitrator.

In those claims and counterclaims which are not for a monetary amount, an appropriate administrative fee will be determined by the AAA, payable prior to such notice of appointment.

Amount of Claim or Counterclaim	Fee for Claim or Counterclaim
\$1 to \$20,000	3% (minimum \$200)
\$20,000 to \$40,000	\$ 600, plus 2% of excess over \$20,000
\$40,000 to \$80,000	\$1,000, plus 1% of excess over \$40,000
\$80,000 to \$160,000	\$1,400, plus ½% of excess over \$80,000
\$160,000 to \$5,000,000	\$1,800, plus ¼% of excess over \$160,000

Where the claim or counterclaim exceeds \$5 million, an appropriate fee will be determined by the AAA. If there are more than two parties represented in the arbitration, an additional 10% of the administrative fee will be due for each additional represented party.

When no amount can be stated at the time of filing, the administrative fee is \$500, subject to adjustment in accordance with the schedule as soon as an amount can be disclosed.

OTHER SERVICE CHARGES

\$50 payable by each party for each second and subsequent hearing which is either clerked by the AAA or held in a hearing room provided by the AAA.

POSTPONEMENT FEES

Sole-Arbitrator Cases:

\$50 payable by a party first causing an adjournment of any scheduled hearing.

\$100 payable by a party causing a second or subsequent adjournment of any scheduled hearing.

Three-Arbitrator Cases:

\$75 payable by a party first causing an adjournment of any scheduled hearing.

\$150 payable by a party causing a second or subsequent adjournment of any scheduled hearing.

REFUND SCHEDULE

If the AAA is notified that a case has been settled or withdrawn before a list of Arbitrators has been sent out, all the fee in excess of \$200 will be refunded.

If the AAA is notified that a case has been settled or withdrawn before the original due date for the return of the first list, two-thirds of the fee in excess of \$200 will be refunded.

If the AAA is notified that a case is settled or withdrawn during or following a pre-hearing conference or at least 48 hours before the date and time set for the first hearing, one-third of the fee in excess of \$200 will be refunded.

Appendix B American Arbitration Association Mediation Rules

Construction Industry Introduction

Mediation Rules

AMERICAN CONSULTING
ENGINEERS COUNCIL

AMERICAN INSTITUTE OF ARCHITECTS

AMERICAN SOCIETY OF
CIVIL ENGINEERS

AMERICAN SOCIETY OF
LANDSCAPE ARCHITECTS

AMERICAN SUBCONTRACTORS
ASSOCIATION

ASSOCIATED GENERAL CONTRACTORS

ASSOCIATED SPECIALTY
CONTRACTORS, INC.

CONSTRUCTION SPECIFICATIONS
INSTITUTE

NATIONAL ASSOCIATION OF
HOME BUILDERS

NATIONAL SOCIETY OF
PROFESSIONAL ENGINEERS

NATIONAL UTILITY CONTRACTORS
ASSOCIATION, INC.



American
Arbitration
Association

Representatives of the eleven organizations listed on the front cover constitute the National Construction Industry Arbitration Committee (NCIAC). This committee is the sponsor of the arbitration procedure specially designed for the construction industry by the American Arbitration Association (AAA).

Despite arbitration's acknowledged success in the resolution of a growing number of construction industry disputes, the NCIAC has concluded that it is desirable to provide a supplementary procedure that will serve the parties in resolving disputes in their early stages. Such alternative—mediation—seeks to obviate the kind of preparations necessary for an adversary arbitration or court proceeding, which tend to polarize the parties and harden them in their respective positions.

Mediation consists of the effort of an individual, or several individuals, to assist the parties in reaching the settlement of a controversy or claim by direct negotiations between or among themselves. The mediator participates impartially in the negotiations, advising and consulting the various parties involved. The result of the mediation should be an agreement that the parties find acceptable. The mediator cannot impose a settlement, but can only seek to guide the parties to the achievement of their own settlement.

The AAA will administer the mediation process to achieve orderly, economical, and expeditious mediation, utilizing to the greatest possible extent the competency and acceptability of the arbitrators on the AAA's Construction Industry Panel. Depending on the expertise needed for a given dispute, the parties can obtain the services of one or more

individuals who are willing to serve as mediators and who are trained by the AAA in the necessary mediation skills. In identifying those persons most qualified to mediate, the AAA is assisted by the NCIAC.

The AAA itself does not act as mediator. Its function is to administer the mediation process in accordance with the agreement of the parties, to teach mediation skills to members of the construction industry, and to maintain panels from which topflight mediators may be chosen.

Members of the construction industry, and to maintain panels from which topflight mediators may be chosen.

Mediation Clause

Parties may refer to these rules in their contracts. For this purpose, the following clause may be used:

If a dispute arises out of or relating to this contract, or the breach thereof, and if said dispute cannot be settled through direct discussions, the parties may agree to first endeavor to settle the dispute in an amicable manner by mediation under the Voluntary Construction Mediation Rules of the American Arbitration Association, before having recourse to arbitration or a judicial forum.

Submission to Mediation

After a dispute has arisen, the parties may agree to these rules by means of the following Submission Agreement:

The parties hereby submit the following dispute to mediation under the Voluntary Construction Mediation Rules of the American Arbitration Association. The requirement of filing a notice of claim with respect to the dispute submitted to mediation shall be suspended until the conclusion of the mediation process. (The clause can also provide for the number of mediators, their compensation, method of payment, locale of meetings and any other item of concern to the parties.)



Construction Industry Mediation Rules

1. Agreement of Parties

The parties shall be deemed to have made these rules a part of their agreement whenever, by stipulation or in their contract, they have provided for mediation of existing or future disputes under AAA auspices or under these rules.

2. Initiation of Mediation

Any party or parties to a dispute may initiate mediation by filing a written request for mediation pursuant to these rules.

3. Request for Mediation

A request for mediation shall contain a brief statement of the nature of the dispute and the names and addresses of all parties to the dispute. The initiating party shall simultaneously file two (2) copies of the request with the AAA and one copy with every other party to the dispute and every other person reasonably expected to have a direct financial interest in the outcome of the dispute.

4. Response to Request for Mediation

Each person who receives a request for mediation shall advise the AAA of his willingness to mediate within twenty (20) days after the date of mailing of the mediation request and the AAA shall so advise all of the other parties.

5. Appointment of Mediator

Based upon the nature of the issues in dispute and the preferences of the parties, the AAA shall appoint one or more qualified mediator(s) to serve. In all instances, a single mediator will be appointed unless the parties agree otherwise, or the nature of the issues requires the appointment of a larger number. If the agreement of the parties names a mediator or specifies a method of appointing a mediator, that designation or method shall be followed.

6. Qualifications of a mediator

Any mediator appointed shall be a member of the AAA's Construction Mediation Panel, with expertise in the area of the dispute and knowledgeable in the mediation process.

No person shall serve as a mediator in any dispute in which that person has any financial or personal interest in the result of the mediation, except by consent of the parties. Prior to accepting an appointment, the prospective mediator shall disclose any circumstances likely to create a presumption of bias or prevent prompt meetings with the parties. Upon receipt of such information, the AAA shall either replace the mediator or immediately communicate the information to the parties for their comments. If the appointed mediator is unable to serve promptly, the AAA is authorized to appoint another mediator.

7. Time and Place of Mediation

The Mediator, with the agreement of the parties or at his own initiative, shall fix the time of each mediation session. The mediation will be held at the construction site, or at the nearest regional office of the AAA, or at any other convenient location agreeable to the mediator and the parties.

8. Authority of Mediator

The mediator is authorized to conduct joint and separate meetings with the parties and to make oral recommendations for settlement. Whenever necessary, the mediator may also obtain expert advice concerning technical aspects of the dispute, provided the parties agree and assume the expense of obtaining such advice. Arrangements for such advice shall be made by the AAA.

The mediator is authorized to end the mediation whenever, in his judgment, further efforts at mediation would not contribute to a solution of the dispute between the parties.

Normally, mediators do not write reports of the mediation process, unless the parties agree otherwise.

9. Privacy

The mediator shall maintain the privacy of the mediation effort. Nothing that transpires during the mediation proceeding is intended in any way to affect the rights or prejudice the position of any of

the parties to the dispute in any later arbitration, litigation, or proceeding.

10. No Stenographic Record

There shall be no stenographic record of the mediation process.

11. Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the mediation, including required travelling and other expenses of the mediator and representatives of the AAA, and the expenses of any witness, or the cost of any proofs or expert advice produced at the direct request of the mediator, shall be borne equally by the parties unless they agree otherwise.

FEE SCHEDULE

Administrative Fee

An initial administrative fee of the AAA of \$200 for each party shall be paid at the time of filing of the mediation request. No refund of the initial fee is made when a matter is withdrawn or settled after the filing of the mediation request.

Additional Sessions

A fee of \$50 is payable by each party for each second and subsequent mediation session that is either attended by an AAA staff representative or held in a hearing room provided by the AAA.

Postponement Fee

A fee of \$50 is payable by a party causing a postponement of any scheduled mediation session.

Mediator's Fee

Mediators on AAA's Construction Mediation Panel will serve without compensation for the first day. Thereafter, the mediator shall be compensated at a reasonable rate, agreeable to the parties, to be arranged by the AAA. The mediator's fee shall be borne equally by the parties unless they agree otherwise.

Deposits

Before the commencement of mediation, the parties shall each deposit half of the fee covering the cost of mediation and of any appropriate additional sums the AAA deems necessary to defray the expenses of the proceeding. When the mediation is concluded by settlement or terminates without a settlement, the AAA shall render an accounting and return any unexpended balance to the parties.

Appendix C California Regulations

STATE CONTRACT ACT

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Article 7.1. Resolution of Contract Claims

Arbitration Procedures

10240. The remedy for the resolution of claims arising under contracts made under the provisions of this chapter shall be arbitration pursuant to this chapter.

Commencement of Arbitration

10240.1. The claimant may initiate arbitration not later than 180 days after the date of service in person or by mail on the claimant of the final written decision by the department on the claim. This limitation shall not apply to any claim founded on any cost audit, latent defect, warranty, or guarantee under the contract.

Administrative Review

10240.2. A failure by the claimant to pursue diligently and exhaust, as to the claim, the required administrative procedures set forth in the contract under which the claim arose shall be a bar to arbitration hereunder until there has been compliance therewith. Subject to the preceding sentence, if more than 240 days have elapsed since acceptance of the work by the department, the claimant is entitled to arbitration, even though the procedures are not concluded.

Selection of Arbitrator

10240.3. Unless otherwise agreed by the parties, the arbitration shall be conducted by a single arbitrator selected by the parties from the certified list created by the Public Works Contract Arbitration Committee. If the parties cannot agree on the arbitrator, either party may petition the superior court to appoint one from the panel of arbitrators certified by the Public Works Contract Arbitration Committee.

Finality of Decision

10240.4. No decision made by a department shall be conclusive on any issue in the arbitration.

Uniform Regulations

10240.5. The Departments of General Services, Transportation, and Water Resources shall jointly adopt and may, from time to time, modify, revise, or repeal uniform regulations to implement the provisions of this article, which regulations shall be consistent with this article and Article 7.2 (commencing with Section 10245). The regulations may include but need not be limited to:

- (a) The method of initiating arbitration.
- (b) The place of hearing based upon the convenience of the parties.
- (c) Procedures for the selection of a neutral arbitrator.
- (d) The form and content of any pleading.
- (e) Procedure for conducting hearings.
- (f) The providing of experts to assist the arbitrator in the event the assistance is needed.
- (g) The content of the award.
- (h) Simplified procedures for claims of fifty thousand dollars (\$50,000) or less.

Pending adoption of the initial uniform regulations under this section, the arbitration rules set forth in Subchapter 3 (commencing with Section 301) of Chapter 2 of Title 1 of the California Administrative Code, shall govern the conduct of arbitrations under this chapter.

"Claim" Defined

10240.6. As used in this article, "claim" means a demand for monetary compensation or damages, arising under or relating to the performance of a contract awarded under this chapter.

"Committee" Defined

10240.7. As used in this article, "Public Works Contract Arbitration Committee" means the committee created by Article 7.2 (commencing with Section 10245).

The Decision

10240.8. Unless the parties to the contract otherwise agree, the arbitration decision shall be decided under and in accordance with the law of this state, supported by substantial evidence and, in writing, contain the basis for the decision, findings of fact, and conclusions of law.

Other Parties

10240.9. A party to the contract may join in the arbitration as a party, any supplier, subcontractor, design professional, surety, or other person who has so agreed and if the joinder is necessary to prevent a substantial risk of the party otherwise being subjected to inconsistent obligations or decisions.

Waiver of Article

10240.10. Nothing in this article shall be construed as preventing the parties to the contract, after the claim has arisen, from mutually agreeing in writing to waive the provisions of this article and to have the claim litigated in a court of competent jurisdiction.

Arbitration Procedures

10240.11. Except as provided in this article and in the regulations adopted pursuant to Section 10240.5, the procedure governing the arbitrations shall be as set forth in Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure. All provisions of Section 1283.05 of the Code of Civil Procedure, except subdivision (e) thereof, apply to the conduct of discovery for any arbitration hereunder.

Review of Award

10240.12. A party may, within the applicable time periods and upon the grounds specified in this section and in Article 1 (commencing with Section 1285) of Chapter 4 of Title 9 of Part 3 of the Code of Civil Procedure, petition the court to confirm, correct, or vacate the award rendered by the arbitrator. However, no department may petition to vacate an award without the prior written authorization of its agency secretary. Except where the parties agree not to have the arbitration decision rendered in accordance with the provisions of Section 10240.8, a court shall vacate the award, or part thereof, if it determines either that the award, or part thereof, is not supported by substantial evidence or that it is not decided under or in accordance with the laws of this state. If the award, or part thereof, is vacated on the grounds set forth in the preceding sentence or in subdivision (d) or (e) of Section 1286.2 of the Code of Civil Procedure or if the court determines that the award does not include a determination of all submitted questions necessary to determine the controversy, the court may order a rehearing before the original arbitrator or remand to the original arbitrator that portion of the dispute which the court concludes the arbitrator failed to determine.

Recoverable Costs

10240.13. The cost of conducting the arbitration shall be borne equally by the parties. The filing fee, witness fees, costs of discovery, or any other cost necessarily incurred by one party shall not be shared by any other party, except that the arbitrator may allow the prevailing party to recover its costs and necessary disbursements, other than attorney's fees, on the same basis as is allowed in civil actions. These costs shall be taxed as in civil actions.

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Interest may be recovered as part of the award as in a civil action. The arbitrator has the same authority as a court in awarding interest and the commencement of the arbitration is equivalent to the filing of an action under subdivision (b) of Section 3287 of the Civil Code for the purpose of an award of interest.

If a party has made an offer of settlement and the award is less favorable than the offer, then the party who has received the offer shall not recover any interest accruing from and after the date on which the offer was made, nor costs of suit.

Reasonable attorney fees may be recovered according to any of the following:

(a) By a party who has made an offer under the circumstances set forth in the preceding sentence but only as to those fees incurred from and after the time of making the offer.

(b) Against a party when substantial evidence establishes that the party has acted frivolously or in bad faith in its demand for, or participation in, the arbitration.

Article 7.2. Public Works Contract Arbitration Committee

The Committee

10245. There is hereby established the Public Works Contract Arbitration Committee, which shall consist of seven members, as follows:

(a) Three public members, who shall be appointed by the Governor, each of whom shall have at least ten years' experience with a general contracting firm engaged, during that period, in public works construction in California.

(b) The directors of the Departments of General Services, Transportation, and Water Resources shall each appoint a member, who shall be a state officer or employee within their respective departments. Each member shall serve at the pleasure of the director who appointed the member.

(c) The Director of the Office of Administrative Hearings shall be a nonvoting member of the Public Works Contract Arbitration Committee.

Term

10245.1. Each member appointed by the Governor shall serve for a term of four years, but shall continue in office until the successor to the member is appointed. Each member shall serve without compensation, but shall be reimbursed for travel and other expenses necessarily incurred in the performance of the member's duties.

Procedures

10245.2. The committee may make recommendations to the departments respecting the arbitration practice and procedure provided by Article 7.1 (commencing with Section 10240). The departments shall consult and confer with the committee respecting the content of the uniform regulations governing the conduct of arbitrations under Article 7.1 (commencing with Section 10240) and shall consider the recommendations in adopting uniform regulations pursuant to Section 10240.5

Certification of Arbitrators

10245.3. The committee may establish standards and qualifications for the certification of arbitrators and certify as arbitrators persons meeting such standards and qualifications. The committee may remove persons from its list of certified arbitrators.

Administrative Support

10245.4. The Office of Administrative Hearings shall provide administrative services, facilities, and fiscal support to implement this article and Article 7.1 (commencing with Section 10240). The cost thereof shall be recovered through filing fees imposed for each arbitration.

Article 8. Modifications; Performance; Payment***Change in Unit Basis Contract***

10250. The department may increase or decrease quantities of work to be done under a unit basis contract during the progress of the work.

Provisions re Extra Work

10251. The department may cause the insertion of provisions in any contract for the performance of such extra work and the furnishing of materials therefor by the contractor as the department requires for the proper completion or construction of the whole work contemplated, if the bidders have equal opportunity of knowing the proposed terms for the extra work.

Extension of Time

10252. The director may grant such extensions of time for completion as he deems for the best interests of the state.

Failure of Contractor to Prosecute Work; Termination of Contractor's Control Over Work

10253. If the director deems that a contractor has failed to supply an adequate working force, or material of proper quality, or has failed to comply with Section 10262, or has failed in any other respect to prosecute the work with the diligence and force specified by the contract, the director may:

- (a) After written notice of at least five days to the contractor, specifying the defaults to be remedied, provide any such labor or materials and deduct the cost from any money due or to become due to the contractor under the contract; or
- (b) If he considers that the failure is sufficient ground for such action, he may give written notice of at least five days to the contractor and the contractor's sureties, that if the defaults are not remedied the contractor's control over the work will be terminated.

Termination of Contractor's Control

10254. If the defaults are not remedied within the time specified in the notice, the contractor's control shall terminate as of the expiration of that time.

Procedure on Completion of Contract by State

10255. Upon such termination, the director may take possession of and use all or any part of the contractor's materials, tools, equipment, and appliances upon the premises to complete the contract. Thereupon, he may permit the surety to complete or cause the contract work to be completed, or he may direct that all or any part of the work be completed by day's labor or by employment of other contractors on informal contracts, or both.

Informal Contracts

10256. Such informal contracts may be awarded only after a proposal form has been prepared, a copy is served upon the contractor whose control has been terminated, and upon his surety, and three days allowed thereafter so that he may cause others to bid. Any person who is prequalified therefor under Article 4 may bid on informal contracts.

5-1.06 ARBITRATION.--Article 8.1, (Sections 14410-14410.13, inclusive) of Chapter 3, Part 5, Division 3 of Title 2 of the Government Code (Chapter 769, Statutes of 1981) provides for the resolution of contract claims by arbitration.

Claims (demands for monetary compensation or damages) arising under or related to performance of the contract shall be resolved by arbitration unless the Department and the Contractor agree in writing, after the claim has arisen, to waive arbitration and to have the claim litigated in a court of competent jurisdiction. Arbitration shall be pursuant to Government Code Sections 14410-14410.13, inclusive, and applicable regulations (see Subchapter 3 [Sections 301-382, inclusive] of Chapter 2 of Title 1 of the California Administrative Code). The arbitration decision shall be decided under and in accordance with the law of this State, supported by substantial evidence and, in writing, contain the basis for the decision, findings of fact, and conclusions of law.

Arbitration shall be initiated by a Demand for Arbitration made in compliance with the requirements of said regulations. A Demand for Arbitration by the Contractor shall be made not later than 180 days after the date of service in person or by mail on the Contractor of the final written decision by the Department on the claim.

Appendix D Florida Regulations

Section 19. Section 337.185, Florida Statutes, 1984 Supplement, is amended to read:

337.185 State Arbitration Board.--

(1) To facilitate the prompt~~,-peaceful,-and-just~~ settlement of claims for additional compensation ~~conflicts-and~~ disputes arising out of construction contracts between the department and the various contractors with whom it transacts business, the Legislature does hereby establish the State

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CODING: Words stricken are deletions; words underlined are additions.

Arbitration Board, referred to in this section as the "board." Every contractual claim or claims in an aggregate amount up to \$100,000 per contract that cannot be resolved conflict or dispute valued at or under \$100,000, arising in the performance of a construction contract, whether initiated by the department and or the contractor, shall be arbitrated by the board after acceptance of the project by the department. A court of law may not consider the settlement of such a claim conflict until the process established by this section has been exhausted.

(2) The board shall be composed of three members. One member shall be appointed by the head of the department, and one member shall be elected by those construction companies who are under contract with the department. The third member shall be chosen by agreement of the other two members. Whenever the third member has a conflict of interest regarding affiliation with one of the parties, the other two members shall select an alternate member for that hearing. Each member shall serve a 2-year term, but a member may not serve more than three consecutive terms. The board shall elect a chairman each term who shall be the administrator of the board and custodian of its records.

(3) A hearing may be requested by the department or by a contractor who has a dispute with the department which, under the rules of the board, may be the subject of arbitration. The board shall conduct the hearing within 45 days of the request. The party requesting the board's consideration shall give notice of the hearing to each member. If the board finds that a third party is necessary to resolve the dispute, the board may vote to dismiss the claim, which may thereafter be pursued in a court of law. ~~The board shall~~

~~have jurisdiction to hear matters concerning \$100,000 or less per contract.~~

(4) All members shall be necessary to conduct a meeting. Upon being called into session, the board shall promptly proceed to a determination of the issue or issues in dispute.

(5) When a valid contract is in effect defining the rights, duties, and liabilities of the parties with respect to any matter in dispute, the board shall have power only to determine the proper interpretation and application of the contract provisions which are involved. Any investigation made by less than the whole membership of the board shall be by authority of a written directive by the chairman, and such investigation shall be summarized in writing and considered by the board as part of the record of its proceedings.

(6) The board shall hand down its order within 60 days after it is called into session. If all three members of the board do not agree, the order of the majority will constitute the order of the board.

(7) The members of the board shall receive no compensation for the performance of their duties hereunder, but, except for the chairman, may be paid an honorarium of up to \$100 per day for each day that the board is in session they shall be reimbursed for expenses as provided in s-112-361, when they attend a meeting or perform a service in conformity with the requirements of this section. If an alternate member is needed, such member may be paid an honorarium of up to reimbursed an additional \$100 for each hearing in which he participates. The chairman may receive an honorarium for his service as administrator of the board of up to \$125 per day for each day that the board is in session and for each day

that he is engaged in activities related to meetings of the board. The board shall allocate \$3,000 annually for clerical and other administrative services per-day-for-expenses--All such-expenses-shall-be-shared-equally-by-the-parties-to-the hearing.

(8) The party requesting arbitration shall pay a fee to the board in accordance with a schedule established by it, not to exceed \$500 per claim, to cover the cost of administration and compensation of the board.

(9) The board in its order may apportion the fee set out in subsection (8) and the cost of recording and preparing a transcript of the hearing among the parties in accordance with the board's finding of liability.

STATE ARBITRATION BOARD
P.O. BOX 1563
TALLAHASSEE, FLORIDA 32302
PHONE: (904) 224-9469

CONDITIONS FOR A CLAIM TO BE ELIGIBLE FOR ARBITRATION

The State Arbitration Board at a meeting held on August 25, 1983 adopted the following conditions which must be met in order for a claim to come before the Board:

1. The claim must be a dispute arising out of a Department of Transportation contract for construction of a transportation facility.
2. Effective for claims for which a hearing is held after October 1, 1984, if the aggregate amount of all claims submitted for arbitration exceeds \$100,000, the party submitting the Request For Arbitration must state, in writing, at the time his request is submitted, that he understands that the maximum amount awarded by the Board cannot exceed \$100,000.
3. Each claim submitted by a contractor must have been previously considered by the office of the State Construction Engineer and the Department of Transportation position in regard to that claim must have been stated by that office.
4. The party requesting Arbitration shall submit to the Board, along with its request, five copies of a brief statement covering each issue in dispute and the amount of additional compensation or contract time claimed. Issues not covered in this statement shall not be introduced during the Arbitration hearing.
5. If a contractor elects to allow an authorized subcontractor to act as his agent in pursuing a claim submitted for Arbitration, he must submit along with his Request For Arbitration a properly executed Authorization For Subcontractor to Pursue Arbitration.
6. If written information is presented to the Board during an Arbitration hearing, it shall be certified before a notary public to be true and correct and five (5) copies shall be furnished.

Appendix E North Dakota Regulations

24-02-26. Controversies to be arbitrated—Arbitrators—How named.
 —All controversies arising out of any contract for the construction or repair of highways entered into by the commissioner shall be submitted to arbitration as provided in this chapter, if the parties cannot agree. Any person who voluntarily enters into a contract for the construction or repair of highways shall be considered as having agreed to arbitration of all controversies arising out of such contract. **Three** persons shall compose the arbitration board, one of whom shall be appointed by each of the parties and the two thus appointed shall name a third.

Source: S. L. 1953, ch. 177, § 79; R. C. 1943, 1957 Supp., § 24-0226.

Constitutionality.

Compulsory arbitration of disputes arising out of highway construction and repair contracts is not denial of due process under Art. I, §§ 13 and 22 of state constitution and Fourteenth Amendment of United States Constitution, nor denial of right to jury trial reserved under Art. I, § 7, of state constitution, and did not violate former Art. IV, § 120, of state constitution which provided that tribunal of conciliation has no power to render obligatory judgment on parties unless parties have voluntarily submitted such matter and have agreed to abide by judgment of such tribunal. *Hjelle v. Sornsin Constr. Co.*, 173 NW 2d 431, explained in 207 NW 2d 225.

Appeal by Arbitrators.

Where arbitration board did not call or hold a meeting with respect to an adverse decision of district court in a proceeding for a writ of prohibition in which

the board was a party and no official action was taken by the arbitrators to appeal, action by two individual members of the board concerning an appeal did not constitute the action of the arbitrators and there was no authorized appeal to the supreme court. *State ex rel. Hjelle v. Bakke*, 117 NW 2d 689, 696.

Arbitration Exclusive Remedy.

Pursuant to this section, **subcontractor** may arbitrate its claims **against both highway commissioner and prime contractor**, but such claims must be asserted in separate proceedings and arbitration is exclusive remedy for all parties. *Hjelle v. Sornsin Constr. Co.*, 173 NW 2d 431, explained in 207 NW 2d 225.

Collateral References.

Arbitration and Award ⇨ 1 et seq.
 Generally as to arbitration, see **5 Am. Jur. 2d**, Arbitration and Award, § 1 et seq.
 6 C. J. S. Arbitration and Award, § 5 et seq.

24-02-27. Arbitration demand—District court may appoint arbitrators if parties fail.—The party desiring arbitration shall make a written demand therefor and in such demand shall name the arbitrator by him selected. He also in such demand shall set forth all the controversies and claims which he desires to submit to arbitration and a concise statement of his claims with reference to each controversy. Such demand shall be served upon the opposite party, who, within ten days, shall name in writing the arbitrator on his part, and in connection therewith shall set forth in writing his contentions with reference to the claims set forth in the demand served upon him and any additional claims or controversies which he desires to submit to arbitration on his part, with a concise statement of his claims in connection therewith. If the party proceeded against shall fail or refuse to name an arbitrator, the moving party may apply ex parte to the judge of the district court of the county in which the improvement in

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the contract in question, or any part thereof, may be located, for the appointment of the two additional arbitrators, and if upon the appointment of an arbitrator by each of the parties, the two so appointed have been unable to agree upon a third arbitrator within five days, then either party to the controversy, upon five days' notice, may apply to such district court for the appointment of such third arbitrator.

Source: S. L. 1953, ch. 177, § 80; R. C. 1943, 1957 Supp., § 24-0227.

24-02-28. Procedure for arbitration.—When a board of arbitration shall have been appointed, a submission in writing shall be executed as provided in section 32-29-02, except that such submission must provide for the entry of judgment upon the award by the district court of the county within which the improvement, or some part thereof, involved in the contract is located. Such county must be specified in such submission. The submission must be executed by the commissioner. Thereupon the arbitration shall proceed in accordance with the provisions of chapter 32-29.

Source: S. L. 1953, ch. 177, § 81; R. C. 1943, 1957 Supp., § 24-0228.

24-02-29. Arbitration may proceed although one party fails to agree.—If either party refuses to submit to arbitration as provided in this chapter, he shall be deemed to have waived all claims and demands, and the arbitrators shall proceed to determine the controversies set forth by the moving party according to the justice of the case. Judgment shall be entered upon the award of such arbitrators in all things the same as though the submission to arbitration has been signed by both parties.

Source: S. L. 1953, ch. 177, § 82; R. C. 1943, 1957 Supp., § 24-0229.

24-02-30. Conditions precedent to demand for arbitration against commissioner.—No right shall exist to demand arbitration against the commissioner until the conditions specified in this section shall have been complied with. The contractor must give the commissioner notice in writing that he claims the contract has been or will be performed fully on a day stated, which shall not be less than ten days after the giving of such notice. At the time stated in the notice the commissioner shall cause the work to be inspected, and if he claims the work has not been completed, he, with all reasonable dispatch, having regard to the early completion of the work, shall specify the particulars in which it is incomplete and shall direct that it be completed accordingly, or if he considers further work necessary to bring the project up to the desired standard for acceptance either by him or the United States public roads administration, even though he considers such contract complete, he likewise may specify any such additional work. The contractor must proceed with all reasonable dispatch, having due regard

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to weather conditions, with the performance of all such additional work with a view to a speedy completion of the project. When the contractor claims in good faith, supported by affidavit furnished to the commissioner, that he has completed such additional work according to the specifications furnished to him, and the commissioner fails for ten days to accept such work as completed, he shall have the right to institute proceedings under this chapter.

Source: S. L. 1953, ch. 177, § 83; R. C. 1943, 1957 Supp., § 24-0230.

24-02-31. Arbitrators shall determine all controversies—May give directions.—The arbitrators shall determine all controversies between the parties growing out of the contract, including the question whether it had been performed at the time claimed by the contractor and whether the additional work required by the commissioner as specified has been done, and if not done they shall specify the particulars in which it has not been done, give appropriate directions with reference thereto, and shall make a proper award for any extra work they find the contractor entitled to, making such award so far as it is practicable upon the basis of the contract price, having due regard to what is just and equitable between the parties under the facts and circumstances of the case.

Source: S. L. 1953, ch. 177, § 84; R. C. 1943, 1957 Supp., § 24-0231.

24-02-32. Further arbitration permitted—Arbitration must be commenced within six months.—If after the making of an award which requires the contractor to do further work, any controversies arise between the parties as to the doing of such work, such controversies may be submitted to the same arbitrators on five days' notice for further determination.

No arbitration shall be had under this chapter unless commenced within six months after the right thereto has arisen.

Source: S. L. 1953, ch. 177, §§ 85, 86; R. C. 1943, 1957 Supp., § 24-0232.

Decisions under Prior Law.

Highway commissioner had no authority to extend six months' period of limitation, nor did construction company have any right to demand arbitration upon expiration of such period. *Lamb v. Northern Improvement Co.*, 71 ND 481, 3 NW 2d 77.

District court had no authority to en-

ter judgment upon award of arbitrators made after expiration of six months' period. *Lamb v. Northern Improvement Co.*, 71 ND 481, 3 NW 2d 77.

Under statute providing for the arbitration of controversies between the state highway commission and parties contracting therewith, proceedings had to be held within six months after the right to arbitration arose. *Lamb v. Northern Improvement Co.*, 71 ND 481, 3 NW 2d 77.

24-02-33. Judgment against commissioner—How collected.—When judgment shall have been entered against the commissioner, the same shall not be collectible or enforceable by execution, but if the same provides for the payment of money by the commissioner, it shall be

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paid in the same manner, to the same extent, and out of the same funds as though the claims thus established had been recognized and allowed without arbitration. The performance of the duty of the commissioner with reference to payment or other compliance with such judgment may be enforced by mandamus proceedings in the district courts of the state.

Source: S. L. 1953, ch. 177, § 87; R. C. 1943, 1957 Supp., § 24-0233.

24-02-31. Preparation of standard contract forms.—The commissioner may prepare, adopt or amend uniform standard forms of contracts, bonds, estimates and other forms and documents deemed essential for the efficient administration of highway matters within the department.

Source: S. L. 1953, ch. 177, § 88; R. C. 1943, 1957 Supp., § 24-0234.

24-02-35. Contracts—For road and bridge work and materials—Awarding to residents of North Dakota and giving preference to residents of North Dakota.—Repealed by S. L. 1959, ch. 234, § 1.

24-02-36. State funds not used on feeder roads.—Except as provided in section 24-01-48 no state funds shall be expended for feeder roads or other roads not on the state highway system except for the necessary administrative costs and for such work as is reimbursable from federal or county funds or from funds of other organizations or governmental departments for which reimbursement arrangements have been made. After completion of any such cooperative construction, all authority and control over roads off the state highway system shall be returned to the local authorities under whom control was vested previously.

Source: S. L. 1953, ch. 177, § 113; R. C. 1943, 1957 Supp., § 24-0236; S. L. 1959, ch. 235, § 3.

24-02-37. State highway fund—How expended.—The state highway fund, created by law and not otherwise appropriated and allocated, shall be applied and used for the purposes herein named and in the following order of priority:

1. The cost of maintaining the state highway system.
2. The cost of construction and reconstruction of highways in the amount necessary to match in whatever proportion may be required, federal aid granted to this state by the United States government for road purposes in North Dakota.
3. Any portion of the highway fund not allocated as provided in subsections 1 and 2 may be expended for the construction of state highways without federal aid or may be expended in the construction, improvement, or maintenance of such state highways.

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to advertise the same, request bids, and award such contracts in the manner provided in this chapter. Whenever any proposed contract or work of the department shall be for a sum less than five thousand dollars, it shall be discretionary with the department whether the same shall be awarded after advertising for bids. The department shall award such contracts in the manner provided in this chapter, but where contracts are in excess of three thousand dollars, the department shall request bids from as many contractors, manufacturers, and dealers as can be requested conveniently.

Source: N.D.C.C., S.L. 1981, ch. 291, § 2.

24-02-25.1. Claims against project — Notice of claim — When filed — Where filed. Any person who has furnished labor, materials, or supplies on a contract awarded under section 24-02-23, and who has not been paid in full at the time of final acceptance of the project by the department, shall have the right to file a claim against the contractor and the surety furnishing the performance bond.

Notice of the claim shall be given, in writing, to the contractor or the surety furnishing the performance bond and must provide a clear and concise statement of the labor, materials, and supplies furnished, to whom it was furnished, and the monetary value thereof. The notice of the claim shall be made by registered mail postage prepaid, in an envelope addressed to the contractor at any place the contractor maintains an office or has a residence and posted within ninety days from the date on which the person completed the contribution giving rise to the claim.

Source: S.L. 1983, ch. 301, § 1.

24-02-25.2. Actions against contractor and surety - Time. Any person who has furnished labor, materials, or supplies and made a claim under section 24-02-25.1, shall have the right to commence an action to recover the amount of his claim against the contractor or surety within one year of the date of the final acceptance of the project by the department.

Source: S.L. 1983, ch. 301, § 2.

24-02-26.1. Condition precedent to contractor demand for arbitration — Claims for extra compensation. In addition to the provisions of section 24-02-30, full compliance by a contractor with the provisions of this section is a condition precedent to the contractor's right to demand arbitration. If the contractor believes the contractor is entitled to additional compensation for work or materials not covered in the contract or not ordered by the engineer as extra work or force account work in accordance with the contract specifications, the contractor shall, prior to beginning the work which the claim will be based upon, notify the engineer in writing of the intent to make claim for additional compensation. If the basis for the claim does not become apparent until the contractor has commenced work on the project and it is not feasible to stop the work, the contractor shall immediately notify the engineer that the work is continuing and that written notification of the intent to make claim will be submitted within ten calendar days. Failure of the contractor to give the notification required and to afford the engineer facilities and assistance in keeping strict account of actual costs will constitute a waiver of claim for additional compensation in connection with the work already performed. Notification of a claim, and the fact that the engineer has kept account of the costs involved, shall not be construed as proving or substantiating the validity or actual value of the claim.

The contractor shall make available to the department and allow the department to examine and copy all of the contractor's records, documents, worksheets, and

other data which are pertinent to the justification of the claim and to the substantiation of all costs related to the claim.

Source: S.L. 1983, ch. 305, § 1.

24-02-27. Arbitration demand — District court may appoint arbitrators if parties fail — Arbitration pool. The party desiring arbitration shall make a written demand therefor and in such demand shall name the arbitrator by him selected. He also in such demand shall set forth all the controversies and claims which he desires to submit to arbitration and a concise statement of his claims with reference to each controversy. Such demand shall be served upon the opposite party, who, within ten days, shall name in writing the arbitrator on his part, and in connection therewith shall set forth in writing his contentions with reference to the claims set forth in the demand served upon him and any additional claims or controversies which he desires to submit to arbitration on his part, with a concise statement of his claims in connection therewith. If the party proceeded against shall fail or refuse to name an arbitrator, the moving party may apply ex parte to the judge of the district court of the county in which the improvement in the contract in question, or any part thereof, may be located, for the appointment of the two additional arbitrators, and if upon the appointment of an arbitrator by each of the parties, the two so appointed have been unable to agree upon a third arbitrator within five days, then either party to the controversy, upon five days' notice, may apply to such district court for the appointment of such third arbitrator.

All arbitrators shall be selected from an arbitration pool which shall consist of fifteen members. The members of the pool shall be appointed by the governor. The governor shall select members to the arbitration pool from lists submitted by the society of professional engineers, the association of general contractors, and the commissioner. The governor shall not select more than five names from any one of the lists submitted. Members of the arbitration pool shall serve a term of two years starting on July 1, 1983. If any vacancy occurs for any reason, the governor shall fill the vacancy for the unexpired term in the same manner as the original selection.

Source: N.D.C.C.; S.L. 1983, ch. 306, § 1.

24-02-35.1. Casual sale of road materials to local governmental units. The department may sell road materials in small quantities on an occasional basis to local governmental units, when the local governmental units are unable to economically procure those quantities of road materials from the private sector.

Source: S.L. 1983, ch. 308, § 1.

24-02-35.2. Deposit of sale proceeds — Continuing appropriation. The proceeds from any sale of road materials made under section 24-02-35.1 must be deposited in the state highway department fund. An amount not to exceed the total sum of the sales under section 24-02-35.1, but not to exceed two hundred thousand dollars a year, may be withdrawn upon voucher of the department for purchasing road materials. All moneys deposited in the fund pursuant to this section are hereby appropriated to the department for the purposes of this section.

Source: S.L. 1983, ch. 308, § 1.

32-28-03

JUDICIAL REMEDIES

Rights and remedies of parents inter se with respect to the names of their children, 53 ALR 2d 914.

Adoption proceeding, change of child's name in, 53 ALR 2d 927.

Married woman, right to use maiden surname, 67 ALR 3d 1266.

32-28-03. Change of name of city—Petition.—Whenever it may be desirable to change the name of any city in any county of the state, a petition for that purpose in like manner may be filed in the district court of the county in which such city is situated, setting forth the reason why such change of name is desirable and the name asked to be substituted. The court may order such change of name and direct the clerk to enter such order upon the journal of the court, on being satisfied by proof:

1. That the prayer of the petitioners is just, proper, and reasonable.
2. That notice as in case of the change of names of persons provided for in section 32-28-02 has been given.
3. That two-thirds of the legal voters of such city desire such change of name.
4. That there is no other city in the state of the name asked for.

Source: C. Civ. P. 1877, § 736; R. C. 1895, § 6151; R. C. 1899, § 6151; R. C. 1905, § 7863; C. L. 1913, § 8198; R. C. 1943, § 32-2803; S. L. 1967, ch. 323, § 97.

56 Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions, § 29.

62 C. J. S. Municipal Corporations, § 35.

Collateral References.

Municipal Corporations—21.

32-28-04. Costs—Change not to affect rights or pending actions.—All proceedings under this chapter shall be at the cost of the petitioner or petitioners, and judgment may be entered against him or them for costs as in other civil actions. Any change of name under the provisions of this chapter in no manner shall affect or alter any action or legal proceedings then pending, or any right, title, or interest whatsoever.

Source: C. Civ. P. 1877, § 737; R. C. 1895, § 6152; R. C. 1899, § 6152; R. C.

1905, § 7864; C. L. 1913, § 8499; R. C. 1943, § 32-2804.

CHAPTER 32-29

ARBITRATION

Section		Section	
32-29-01	When arbitration authorized.	32-29-07	Motion to affirm award.
32-29-02	Submission to arbitration in writing.	32-29-08	Motion to vacate award of arbitrators—Grounds.
32-29-03	Powers of arbitrators.	32-29-09	Motion to modify award of arbitrators—Grounds.
32-29-04	Oath of arbitrators.	32-29-10	Power of court on motions to vacate or modify award.
32-29-05	Attendance of witnesses before arbitrators compelled.	32-29-11	Judgment upon award—Costs.
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Section		Section	
32-29-13	Subject to same provisions as other judgments.	32-29-18	Procedure when order reversed.
32-29-14	Record on appeal—Power of supreme court.	32-29-19	Action upon award not affected.
32-29-15	How judgment enforced.	32-29-20	Liability for costs when submission revoked.
32-29-16	Costs on setting aside award.	32-29-21	Same when submission in bond.
32-29-17	Appeal from an order vacating award.		

32-29-01. When arbitration authorized.—Persons capable of contracting may submit to the decision of one or more arbitrators any controversy which might be the subject of a civil action between them, except the question of title to real property in fee or for life. This qualification does not include questions relating merely to the partition or boundaries of real property.

Source: R. C. 1895, § 5980; R. C. 1899, § 5980; R. C. 1905, § 7692; C. L. 1913, § 8327; R. C. 1943, § 32-2901.

Cross-References.

Cost of care of estrays, see § 36-13-05.

Disagreement as to compensation on change of school bus route, see § 15-34.2-10.

Division of property and indebtedness between township and new city, see § 40-02-16.

Division of township assets and liabilities, see § 58-02-23.

Highway department contract controversies, see §§ 24-02-26 to 24-02-33.

Loss by county mutual insurance company, see § 26-15-16.

State fire and tornado fund insurability and loss, see §§ 26-24-10, 26-24-16, 26-24-18.

Oral Agreement to Arbitrate.

The parties to a controversy may agree orally to submit the matter to arbitration. *Johnsen v. Wineman*, 34 ND 116, 157 NW 679.

Title to Real Property.

An agreement submitting the question of the title to realty in fee to arbitration proceedings is void. *State v. Loy*, 71 ND 243, 299 NW 908.

Collateral References.

Arbitration—1-25.

5 Am. Jur. 2d, Arbitration and Award, §§ 6-10, 54-70.

6 C. J. S. Arbitration, §§ 4, 7-57.

Condition precedent to the bringing of action, validity of agreements to arbitrate disputes generally as, 26 ALR 1077.

Specific performance of provision for renewal of lease at rent to be fixed by arbitration, 30 ALR 580; 68 ALR 159; 166 ALR 1245.

Municipality's or county's power to submit to arbitration, 40 ALR 1370.

Voluntary dismissal or nonsuit, right of plaintiff to take, after case has been submitted to arbitration by agreement, 89 ALR 99; 126 ALR 284.

Probate matters, validity of agreement to arbitrate issues or questions pertaining to, 104 ALR 359.

Right of arbitrator to consider or to base his decision upon matters other than those involved in the legal principles applicable to the questions at issue between the parties, 112 ALR 873.

Waiver of arbitration provision in contract, 117 ALR 301; 161 ALR 1426.

Estoppel to rely on statute of limitations by agreement to arbitrate, 130 ALR 42; 24 ALR 2d 1413.

Future questions, validity of agreement for submission of, to arbitration, 135 ALR 79.

Sales contracts, construction of arbitration provisions as regards questions to be submitted to arbitrators, 136 ALR 364.

Assignee, arbitration provisions of contract as available to or against, 142 ALR 1092.

Statutes relating specifically to rights, duties, and obligations between employer and employee, claims based on provisions of, as subject to arbitration provisions of contracts or statutes, 149 ALR 276.

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Contractual provisions for determination by arbitrators of the price to be paid for property, or the amount of damages for breach, as contemplating formal arbitration or the individual judgment of the arbitrators, 157 ALR 1286.

Misconduct of arbitrator in viewing or visiting premises or property alone as affected by waiver or consent, 27 ALR 2d 1162.

Laches, loss of right to arbitration through, 37 ALR 2d 1125.

Employment contract: arbitration provisions of employment contract provision for severance or dismissal pay, 40 ALR 2d 1052.

Contract providing that it is governed by or subject to rules or regulations of a particular trade, business, or association as incorporating agreement to arbitrate, 41 ALR 2d 872.

Validity of arbitration agreement provision that, upon one party's failure to appoint arbitrator, controversy may be determined by arbitrator appointed by other party, 47 ALR 2d 1346.

Constitutionality of arbitration statutes, 55 ALR 2d 432.

Death of party to arbitration agreement before award as limitation of submission, 63 ALR 2d 751.

Closed corporation, agreement for arbitration of disputes within, 64 ALR 2d 643.

Dissolved corporation's power to participate in arbitration proceedings, 71 ALR 2d 1121.

Infants, agreement to arbitrate future controversies as binding on, 78 ALR 2d 1292.

Fraud in inducement of contract, claim of, as subject to compulsory arbitration clause contained in contract, 91 ALR 2d 936.

Declaratory judgment: availability and scope of declaratory judgment actions in determining rights of parties, or powers and exercise thereof by arbitrators, under arbitration agreements, 12 ALR 3d 854.

Other jurisdiction: validity and effect, and remedy in respect, of contractual stipulation to submit disputes to arbitration in another jurisdiction, 12 ALR 3d 892.

Alimony: validity and construction of provision for arbitration of disputes as to alimony or support payments, or child visitation or custody matters, 18 ALR 3d 1264.

Municipal corporation's power to submit to arbitration, 20 ALR 3d 569.

Insurance: necessity and sufficiency of notice of and hearing in proceedings before appraisers and arbitrators appointed to determine amount of loss, 25 ALR 3d 680.

Delay in asserting contractual right to arbitration as precluding enforcement thereof, 25 ALR 3d 1171.

Waiver of objections to arbitrability, participation in arbitration proceedings as, 33 ALR 3d 1242.

32-29-02. Submission to arbitration in writing.—The submission to arbitration must be in writing and acknowledged by the parties thereto in the same manner as a conveyance of real property, and may fix the time on or before which the award shall be made and provide that judgment may be entered upon the award by the district court in and for a specified county.

Source: R. C. 1895, § 5981; R. C. 1899, § 5981; R. C. 1905, § 7693; C. L. 1913, § 8328; R. C. 1913, § 32-2902.

Acknowledgment.

To authorize the entry of judgment upon a statutory award, the agreement for submission must be acknowledged by the parties the same as a conveyance of real property. *Gessner v. Minneapolis*,

St. P. & S. S. M. Ry. Co., 15 ND 560, 108 NW 786.

Collateral References.

Arbitration—6, 6.1, 11.5, 12, 12.1, 12.2.

5 Am. Jur. 2d, Arbitration and Award, §§ 11-13.

6 C. J. S. Arbitration, §§ 14-17, 22.

32-29-03. Powers of arbitrators.—Arbitrators have power to appoint a time and place for hearing, to adjourn from time to time, to

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administer oaths to witnesses, to hear the allegations and evidence of the parties, and to make the award thereon. All the arbitrators must meet and act together during the investigation, but when met a majority may determine any question.

Source: R. C. 1895, § 5982; R. C. 1899, § 5982; R. C. 1905, § 7694; C. L. 1913, § 8329; R. C. 1943, § 32-2903.

Refusal to Consider Evidence.

If the arbitrators refused to consider evidence offered, such action, if pleaded and proven, would vitiate the award. *Caldwell v. Brooks Elevator Co.*, 10 ND 575, 88 NW 700.

Collateral References.

Arbitration—29-35.

5 Am. Jur. 2d, Arbitration and Award, §§ 90-93.

6 C. J. S. Arbitration, §§ 76-94.

Quotient arbitration award or appraisal, 20 ALR 2d 958.

Vacancy: effect of vacancy through resignation, withdrawal, or death of one of multiple arbitrators on authority of remaining arbitrators to render award, 49 ALR 2d 900.

Injunction, power of arbitrators to award, 70 ALR 2d 1055.

Findings of fact or conclusions of law, necessity that arbitrators, in making awards, make specific or detailed, 82 ALR 2d 969.

32-29-04. Oath of arbitrators.—Before acting, the arbitrators must be sworn before an officer authorized to administer oaths, faithfully and fairly to hear and examine the allegations and evidence of the parties in relation to the matters in controversy and to make a just award according to their understanding.

Source: R. C. 1895, § 5983; R. C. 1899, § 5983; R. C. 1905, § 7695; C. L. 1913, § 8330; R. C. 1943, § 32-2904.

Subsequent Defective Oath.

Where arbitrators were duly sworn before they commenced their deliberations, and later the same oath was defectively reduced to writing, the defect was of no consequence. *Caldwell v. Brooks Elevator Co.*, 10 ND 575, 88 NW 700.

Waiver of Irregularities.

Where both parties submitted to, and appeared before, arbitrators without calling arbitrators' attention to their failure to take the oath or cause the witnesses to be sworn, parties waived such irregularities. *Hackney v. Adam*, 20 ND 130, 127 NW 519.

Collateral References.

Arbitration—28.

5 Am. Jur. 2d, Arbitration and Award, § 109.

6 C. J. S. Arbitration, § 67.

32-29-05. Attendance of witnesses before arbitrators compelled. — Witnesses may be compelled to appear before such arbitrators by subpoena to be issued by any county justice, in the same manner and with like effect, and subject to the same penalties for disobedience, as in cases of trials before county justices.

Source: R. C. 1895, § 5984; R. C. 1899, § 5984; R. C. 1905, § 7696; C. L. 1913, § 8331; R. C. 1943, § 32-2905.

Collateral References.

Arbitration—34.2.

5 Am. Jur. 2d, Arbitration and Award, § 121.

6 C. J. S. Arbitration, § 87.

32-29-06. How award of arbitrators executed — When filed. — The award must be in writing signed by the arbitrators or a majority of

them and acknowledged in the same manner as a conveyance of real property. If the submission provides for the entry of judgment upon the award, the arbitrators shall file the submission together with their award in the office of the clerk of the district court of the county specified in the submission and shall notify each of the parties to the arbitration thereof in writing. If the submission does not provide for the entry of judgment upon the award, the arbitrators shall deliver a copy of the award to each of the parties to the arbitration.

Source: R. C. 1895, § 5985; R. C. 1899, § 5985; R. C. 1905, § 7697; C. L. 1913, § 8332; R. C. 1913, § 32-2906.

Collateral References.

Arbitration ◯ 49-55.

5 Am. Jur. 2d, Arbitration and Award, §§ 125, 132.

6 C. J. S. Arbitration, §§ 96-103.

Abandonment by mutual consent of award under arbitration, 32 ALR 1365.

Enforcement of award upon submission of subject matter of pending action to arbitration, by judgment in same action, 42 ALR 736.

Extraterritorial enforcement of award, 73 ALR 1460.

Right of arbitrator to consider or to base his decision upon matters other than those involved in the legal principles applicable to the questions at issue between the parties, 112 ALR 873.

32-29-07. Motion to affirm award.—Any party to the submission at any time within one year after the award is filed, and upon eight days' notice to the adverse party, may move the court designated in the submission to affirm the award, and the same shall be affirmed accordingly, unless a motion is made to modify or vacate the award in which case the latter motion shall be disposed of first.

Source: R. C. 1895, § 5986; R. C. 1899, § 5986; R. C. 1905, § 7698; C. L. 1913, § 8333; R. C. 1913, § 32-2907.

Collateral References.

Arbitration ◯ 71-72.4.

5 Am. Jur. 2d, Arbitration and Award, § 161.

6 C. J. S. Arbitration, §§ 120-122.

32-29-08. Motion to vacate award of arbitrators — Grounds. — Any party to such submission may move the court designated therein to vacate the award upon any of the following grounds:

1. That such award was procured by corruption, fraud, or other undue means.
2. That there was evident partiality or corruption in the arbitrators, or either of them.
3. That the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or refusing to hear any evidence pertinent and material to the controversy, or for any other misbehavior of such arbitrators by which the rights of any party shall have been prejudiced.
4. That the arbitrators exceeded their powers, or that they so imperfectly executed them, that a mutual, final, and definite award on the subject matter submitted was not made.

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Source: R. C. 1895, § 5987; R. C. 1899, § 5987; R. C. 1905, § 7699; C. L. 1913, § 8334; R. C. 1943, § 32-2908.

Final Award.

An award must be complete and final as to all matters embraced in the submission. *Maw v. Kitzman*, 55 ND 463, 214 NW 273.

Trial de Novo.

An appeal from an order vacating an award does not call for a trial de novo. *Maw v. Kitzman*, 55 ND 463, 214 NW 273.

When Motion Denied.

A motion to vacate an award may be denied when the moving party fails to bring himself within the statutory grounds therefor. *Hackney v. Adm*, 20 ND 130, 127 NW 519.

Motion to vacate arbitration award under subsection 4 of this section would not be granted unless the award was completely irrational. *Nelson Paving Co., Inc. v. Hjelle*, 207 NW 2d 225.

Collateral References.

Arbitration—75-79.

5 Am. Jur. 2d, Arbitration and Award, §§ 167-189.

6 C. J. S. Arbitration, §§ 149-160, 164-167.

Influencing or attempting to influence decision as ground for avoidance of award, 8 ALR 1082.

Concurrence of all arbitrators as condition of binding award upon submission to arbitration, 77 ALR 838.

Perjury as ground of attack on judgment entered upon award in arbitration, 99 ALR 1202.

Quotient arbitration award or appraisal, 20 ALR 2d 958.

Arbitrator's viewing or visiting premises or property alone as misconduct justifying vacation of award, 27 ALR 2d 1160.

Arbitrator's consultation with outsider or outsiders as misconduct justifying vacation of award, 47 ALR 2d 1362.

Vacation of award of arbitrator as to dispute within closed corporation, 64 ALR 2d 662.

Disqualification of arbitrator by court, prior to award, on ground of interest, bias, prejudice, collusion, or fraud, 65 ALR 2d 755.

Impeachment: time for impeaching arbitration award, 85 ALR 2d 779.

Comment note on determination of validity of arbitration award under requirement that arbitrators shall pass on all matters submitted, 36 ALR 3d 649.

Interest or bias of arbitrators, setting aside arbitration award on ground of, 56 ALR 3d 697.

Time within which arbitration award must be made, construction and effect of contractual or statutory provisions fixing, 56 ALR 3d 815.

32-29-09. Motion to modify award of arbitrators — Grounds. — Any party to a submission also may move the court designated therein to modify or correct an award in any of the following cases:

1. When there is evident miscalculation of figures or an evident mistake in the description of any person, thing, or property referred to in such award.
2. When the arbitrators shall have awarded upon some matter not submitted to them, not affecting the merits of the decision upon the matters submitted.
3. When the award shall be imperfect in some matter of form not affecting the merits of the controversy, and when, if it had been a verdict, such defect could have been amended or disregarded by the court according to the provisions of law.

Source: R. C. 1895, § 5988; R. C. 1899, § 5988; R. C. 1905, § 7700; C. L. 1913, § 8335; R. C. 1943, § 32-2909.

Collateral References.

Arbitration—69.

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5 Am. Jur. 2d, Arbitration and Award, § 143.

6 C. J. S. Arbitration, §§ 119, 168.

Correction: power of arbitrator to correct, or power of court to correct or resubmit, nonlabor award because of incompleteness or failure to pass on all matters submitted, 36 ALR 3d 939.

Resubmission: comment note on power of court to resubmit matter to arbitrators for correction or clarification, because of ambiguity or error in, or omission from, arbitration award, 37 ALR 3d 200.

32-29-10. Power of court on motions to vacate or modify award.—On application made as is provided in section 32-29-08 or 32-29-09, the court may vacate an award in any case specified in this chapter, and if the time within which such award shall have been required to be made by the submission has not expired, it, in its discretion, may direct a rehearing by the arbitrators. In the cases herein specified, the court may modify and correct such award so as to effect the intent thereof and promote justice between the parties.

Source: R. C. 1895, § 5989; R. C. 1899, § 5989; R. C. 1905, § 7701; C. L. 1913, § 8336; R. C. 1943, § 32-2910.

32-29-11. Judgment upon award — Costs. — Upon the affirmation or modification of an award, the court shall render judgment in favor of the party to whom any sum of money or damages shall have been awarded that he recover the same, and if the award shall have ordered any act to be done by either party, judgment shall be entered that such act be done according to such order. The costs of the proceedings shall be taxed as in actions, and if no provision for the fees and expenses of the arbitrators shall have been made in the submission, the court shall make the same allowance as is provided by law for referees, but no costs shall be taxed for any other services or expenses prior to such application.

Source: R. C. 1895, § 5990; R. C. 1899, § 5990; R. C. 1905, § 7702; C. L. 1913, § 8337; R. C. 1943, § 32-2911.

5 Am. Jur. 2d, Arbitration and Award, §§ 103-106, 166.

6 C. J. S. Arbitration, §§ 145-148, 179-183.

Collateral References.

Arbitration 42, 82(6), 84.

32-29-12. How judgment entered.—The judgment of the court on an award shall be entered in the judgment book at length as other judgments of the court, and the clerk of the court immediately after the entry of such judgment shall attach to the submission the award of the arbitrators and a copy of the judgment of the court, and the same shall constitute the judgment roll.

Source: R. C. 1895, § 5991; R. C. 1899, § 5991; R. C. 1905, § 7703; C. L. 1913, § 8338; R. C. 1943, § 32-2912.

32-29-13. Subject to same provisions as other judgments.—The judgment roll upon an award shall be filed and the judgment docketed as

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in other cases, and shall have the same force and effect in all respects, and shall be subject to all the provisions of law in relation to judgments in actions, and may be reviewed in like manner by the supreme court on appeal. Execution shall issue thereon against the property of any party against whom a recovery shall be had in all respects as upon other judgments.

Source: R. C. 1895, § 5992; R. C. 1899, § 5992; R. C. 1905, § 7704; C. L. 1913, § 8339; R. C. 1943, § 32-2913.

Collateral Attack.

Judgment that has been regularly entered is not subject to attack in a separate, independent action to vacate for fraud, misrepresentation, or collusion. *Lamb v. Northern Improvement Co.*, 77 ND 481, 3 NW 2d 77.

Impeaching Judgment.

In an action on an award the defendant may interpose defenses of an equitable nature tending to impeach it, but the correctness of the award upon the merits, when made in good faith, cannot be inquired into. *Caldwell v. Brooks Elevator Co.*, 10 ND 575, 88 NW 700.

32-29-14. Record on appeal—Power of supreme court.—When an appeal shall be taken from a judgment entered upon an arbitration award, the original affidavits upon which any application in relation to such award was founded, and all other affidavits and papers relating to such application, shall be annexed to, form a part of, and be transmitted with, the record of the judgment, unless the court shall order copies thereof to be returned, and the supreme court shall reverse, modify, amend, or affirm such judgment according to justice.

Source: R. C. 1895, § 5993; R. C. 1899, § 5993; R. C. 1905, § 7705; C. L. 1913, § 8340; R. C. 1943, § 32-2914.

Collateral References.

Appealability of judgment confirming or setting aside arbitration award, 7 ALR 3d 608.

32-29-15. How judgment enforced. — When by a judgment entered upon an arbitration award any party shall be required to perform any act other than the payment of money, the court rendering such judgment shall enforce the same in the manner provided for enforcing judgments of a similar nature in other cases.

Source: R. C. 1895, § 5994; R. C. 1899, § 5994; R. C. 1905, § 7706; C. L. 1913, § 8341; R. C. 1943, § 32-2915.

32-29-16. Costs on setting aside award.—If upon application made pursuant to the foregoing provisions the court shall vacate and set aside any award, costs shall be awarded to the prevailing party, and judgment may be rendered therefor and enforced by execution.

Source: R. C. 1895, § 5995; R. C. 1899, § 5995; R. C. 1905, § 7707; C. L. 1913, § 8342; R. C. 1943, § 32-2916.

32-29-17. Appeal from an order vacating award.—Upon any order vacating an award, the party aggrieved may appeal to the supreme

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court, and on such appeal the submission and award and all affidavits and papers used on such application shall be transmitted to the supreme court, unless the court shall order copies thereof returned, and the court shall proceed to affirm or reverse such order as shall be just.

Source: R. C. 1895, § 5996; R. C. 1899, § 5996; R. C. 1905, § 7708; C. L. 1913, § 8313; R. C. 1913, § 32-2917.

Collateral References.

Appealability of judgment confirming or setting aside arbitration award, 7 ALR 3d 608.

32-29-18. Procedure when order reversed.—If an order vacating an award is reversed, the proceedings shall be remitted to the court from which they were removed to proceed thereon, or the supreme court may modify or affirm the award in the same manner and with like effect as if the application for that purpose had been made originally to such court.

Source: R. C. 1895, § 5997; R. C. 1899, § 5997; R. C. 1905, § 7709; C. L. 1913, § 8344; R. C. 1913, § 32-2918.

32-29-19. Action upon award not affected.—Nothing in this chapter shall be construed to impair or affect any action upon an award or upon any bond or other engagement to abide by an award.

Source: R. C. 1895, § 5998; R. C. 1899, § 5998; R. C. 1905, § 7710; C. L. 1913, § 8345; R. C. 1913, § 32-2919.

Common-Law Award.

Award will be upheld if it is sufficient at common law. *Johnsen v. Wineman*, 34 ND 116, 157 NW 679.

Action on Unaffirmed Award.

An action lies upon an award never affirmed. *Hackney v. Adam*, 20 ND 130, 127 NW 519.

32-29-20. Liability for costs when submission revoked.—Whenever any submission to arbitration shall be revoked by a party thereto before the publication of an award, the party so revoking shall be liable to an action by the adverse party to recover all costs and expenses incurred and damages which he may have sustained in preparing for such arbitration, but neither party shall have power to revoke the powers of the arbitrators after the cause shall have been submitted finally to them upon a hearing of the parties for their decision.

Source: R. C. 1895, § 5999; R. C. 1899, § 5999; R. C. 1905, § 7711; C. L. 1913, § 8346; R. C. 1913, § 32-2920.

32-29-21. Same when submission in bond.—If a submission to arbitration is revoked and such submission was contained in the condition of any bond, the obligee in such bond shall be entitled to prosecute the same in such manner as other bonds with condition other than for the payment of money and to assign such revocation as a breach thereof, and for such breach he shall recover as damages the costs and ex-

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penses incurred and the damages sustained by him in preparing for such arbitration.

Source: R. C. 1895, § 6000; R. C. 1899, § 6000; R. C. 1905, § 7712; C. L. 1913, § 8347; R. C. 1943, § 32-2921.

CHAPTER 32-30

PROCEEDINGS AGAINST JOINT DEBTORS

Section		Section	
32-30-01	Joint and several debtors — Procedure when summons not served on all.	32-30-04	Accompanied by affidavit.
32-30-02	Summons after judgment.	32-30-05	Answer.
32-30-03	Requisites of summons.	32-30-06	Further pleadings.
		32-30-07	Pleadings verified.

32-30-01. Joint and several debtors—Procedure when summons not served on all.—When the action is against two or more defendants the plaintiff may proceed as follows:

1. If the action is against defendants jointly indebted upon contract and the summons is served on one or more, he may proceed against the defendant served, unless the court otherwise directs, and if he recovers judgment it may be entered against all the defendants thus jointly indebted to the extent only that it may be enforced against the joint property of all and the separate property of the defendants served, and, if they are subject to arrest, against the persons of the defendants served.
2. If the action is against defendants severally liable and one or more shall be served, he may proceed against the defendants served in the same manner as if they were the only defendants.
3. Where all the defendants have been served, judgment may be taken against any of them severally, when the plaintiff would be entitled to judgment against any one or more of such defendants if the action had been against such defendants or any of them alone.
4. If the name of one or more partners for any cause shall have been omitted in any action in which judgment shall have been entered against the defendants named in the summons, and such omission shall not have been pleaded in such action, the plaintiff, in case the judgment therein shall remain unsatisfied, may recover by action of such partner separately upon proving his joint liability, notwithstanding he may not have been named in the original action, but the plaintiff shall have satisfaction of only one judgment rendered for the same claim for relief.

Source: C. Civ. P. 1877, § 105; R. C. 1895, § 5261; R. C. 1899, § 5261; R. C. 1905, § 6847; C. L. 1913, § 7435; R. C. 1943, § 32-3001.

Derivation: Wait's (N.Y.) Code, 136; Harston's (Cal.) Practice, 414.

Appendix F Kansas Regulations

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Sheet 1

KANSAS DEPARTMENT OF TRANSPORTATION
SPECIAL PROVISION
TO THE
STANDARD SPECIFICATIONS
EDITION OF 1980

NOTE: Whenever this Special Provision conflicts with the Plans or Standard Specifications, this Special Provision shall govern.

ARBITRATION

In the event a contractor's claim as outlined in 105.16 has been disallowed in whole or in part, then the contractor may, within 30 days from the date the ruling of the Secretary of Transportation is mailed to him, make a written request to the Secretary that his claim or claims be submitted to a board of arbitration. The Secretary shall decide whether the matter is one which is subject to arbitration and shall, within 30 days of the receipt for arbitration, grant or deny the same. The Secretary of Transportation's decision shall be final.

If both parties choose to submit the claim to an arbitration board, the decision of the board shall be final and binding.

Said board of arbitration shall consist of three persons - one to be chosen by the Secretary - one by the contractor and the third (who will serve as chairperson) by the two arbitrators thus chosen. Such selection (of the third person) shall be made in seven (7) days following notice of appointment. The arbitrators selected shall be persons experienced and familiar with construction or engineering practices in the general type of work involved in the contract, but shall not have been a regular employee or an individual retained by either party at the time involved in the controversy, or at the time of arbitration.

After the arbitrators are selected the board shall select a mutually convenient time and place for the hearing, which shall be agreed upon within seven (7) days after appointment of the arbitration board, with written notice to the parties.

The board of arbitration shall make its own rule of procedure and shall have authority to examine records kept by the Secretary and the contractor. In determining the findings or award, or both, the majority vote of the board shall govern. Copies of the findings or award, or both, signed by the arbitrators shall be sent by registered mail to the Secretary and the contractor within sixty (60) days after the appointment of the arbitration board.

The Secretary of Transportation shall determine the cost of the proceedings, including reasonable compensation to the arbitrators, with the cost being borne on an equal basis between the Secretary and the contractor.

The board of arbitration shall have jurisdiction to pass upon questions involving compensation to the contractor for work actually performed or materials furnished and upon claims for extra compensation which have not been allowed by the Secretary. Jurisdiction of the board shall not extend to a determination of

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quality of workmanship or materials furnished or to an interpretation of the intent of the plans and specifications except as to matters of compensation. Jurisdiction of the board shall not extend to setting aside or modifying the terms or requirements of the contract, except as to compensation.

The finding or award, or both, of the arbitration board shall become the basis for final payment or settlement of the contractor's claims.

Appendix G Indiana Arbitration Statute Supplement

ARTICLE 4

SPECIAL PROCEEDINGS

CHAPTER	CHAPTER
1 ARBITRATION — GENERALLY, 34-4-1-1, 34-4-1-3, 34-4-1-18.	16.1 PAYMENT OF JUDGMENTS, 34-4-16-4-1, 34-4-16-4-2
2 UNIFORM ARBITRATION ACT, 34-4-2-1, 34-4-2-3, 34-4-2-5 — 34-4-2-7, 34-4-2-10, 34-4-2-12, 34-4-2-13, 34-4-2-16 — 34-4-2-22.	16.5 TORT CLAIMS AGAINST GOVERNMENTAL ENTITIES, 34-4-16-5-1 — 34-4-16-5-19.
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CHAPTER 1

ARBITRATION GENERALLY

SECTION	SECTION
34-4-1-1 Who may arbitrate -- Method of submission	34-4-1-3. Bond — Agreement to make rule of court.
	34-4-1-18. Proceedings on motion.

34-4-1-1. Who may arbitrate — Method of submission. — All persons, except infants and insane persons, may, by an instrument in writing, submit to the arbitration or umpirage of any person or persons, to be by them mutually chosen, any controversy existing between them which might be the subject of a suit at law, except as otherwise provided in section 2 [34-4-1-2] of this chapter, and may agree that each submission be made by a rule of any court of record designated in such instrument. [2 R. S. 1852, ch. 3, § 1, p. 227; Acts 1939, ch. 22, § 1, p. 42; 1982, P.L. 198, § 88.]

Indiana Law Journal. The ABC's of Appellate Representation of Indigents in Indiana Legitimation Law, 18 Ind. L.J. 478. *Indiana, 50 Ind. L.J. 154.*

34-4-1-3. Bond — Agreement to make rule of court. — When an agreement is made according to sections 1 and 2 [34-4-1-1 and 34-4-1-2] of this chapter, the parties shall execute bonds, with condition to abide and faithfully perform the award or umpirage, specifying therein the name of the arbitrator or arbitrators and the matters submitted to their determination, and an agreement to make the submission a rule of court designated in such agreement of submission. [2 R. S. 1852, ch. 3, § 3, p. 227; 1982, P.L. 198, § 89.]

34-4-1-18. Proceedings on motion. — The court shall hear the proofs and allegations of the parties, to invalidate and sustain such award or umpirage, and shall decide thereon, either confirming such award or umpirage, or may modify and correct the same in the cases prescribed in section 17 [34-4-1-17] of this chapter so as to effect the intent thereof, and to promote justice between the parties, and shall render judgment on such original or corrected award or umpirage; or the court may vacate such award or umpirage for any of the causes hereinbefore specified at the costs of the parties seeking to enforce such award or umpirage. [2 R. S. 1852, ch. 3, § 18, p. 227; 1982, P.L. 198, § 90.]

CHAPTER 2

UNIFORM ARBITRATION ACT

SECTION.	SECTION.
34-4-2-1. Validity of arbitration agreement.	34-4-2-13. Vacating an award.
34-4-2-2. Proceedings to compel or stay arbitration.	34-4-2-16. Applications to court.
34-4-2-5. Majority action by arbitrators.	34-4-2-17. Court — Jurisdiction.
34-4-2-6. Hearing.	34-4-2-18. Venue.
34-4-2-7. Representation by attorney.	34-4-2-19. Appeals.
34-4-2-10. Change of award by arbitrators.	34-4-2-20. Act not retroactive.
34-4-2-12. Confirmation of an award.	34-4-2-21. Uniformity of interpretation.
	34-4-2-22. Short title.

34-4-2-1. Validity of arbitration agreement. — (a) A written agreement to submit to arbitration is valid, and enforceable, an existing controversy or a controversy thereafter arising is valid and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. If the parties to such an agreement so stipulate in writing, the agreement may be enforced by designated third persons, who shall in such instances have the same rights as a party under this chapter. This chapter also applies to arbitration agreement between employers and employees or between their respective representatives (unless otherwise provided in the agreement).

(b) This chapter specifically exempts from its coverage all consumer leases, sales, and loan contracts, as these terms are defined in the Uniform Consumer Credit Code (IC 24-4.5) [24-4.5-1-101 — 24-4.5-6-203]. [Acts 1969, ch. 340, § 1; 1982, P.L. 198, § 91.]

Compiler's Notes. In *Kendrick Mem. Hosp. v. Tottem*, — Ind. App. —, 77 Ind. Dec. 322, 408 N.E.2d 130 (1980), the court stated that it believed that a printing error exists in the first sentence of subsection (a) and that it should read "A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Indiana Law Journal. The ABCD's of Indiana Legislation Law, 48 Ind. L. J. 478.

Property Rights Between Unmarried Co-habitants, 50 Ind. L. J. 389.

Indiana Law Review. Survey of Recent Developments in Indiana Law, Labor Law (Edward P. Archer), 16 Ind. L. Rev. 225.

Cited: *Gary Teachers Union No. 4 v. School City of Gary* (1972), 152 Ind. App. 591, 31 Ind. Dec. 540, 284 N.E.2d 108; *International Bld. of Elec. Workers, Local 1400 v. Citizens Gas & Coke Util.*, — Ind. App. —, 428 N.E.2d 1320 (1981).

NOTES TO DECISIONS

ANALYSIS

In general
Construction.
Enforcement of award.
Public employees
School corporations with teachers' unions
Schools.
Waiver

In General.

Where the Federal Arbitration Act is applicable, the Indiana Uniform Arbitration Law is inapplicable. *University Casework Systems v. Bahre*, 172 Ind. App. 624, 57 Ind. Dec. 129, 362 N.E.2d 155 (1977).

Although trial court held that both the Federal Arbitration Act and the Indiana Uniform Arbitration Law were applicable, the error in holding that the Indiana law applied was harmless. *University Casework Systems v. Bahre*, 172 Ind. App. 624, 57 Ind. Dec. 129, 362 N.E.2d 155 (1977).

There is nothing in the Indiana Arbitration Act which requires the court to favor arbitration where the arbitration agreement does not provide for arbitration of a particular question. *Laddy v. Companion Ins. Co.*, 181 Ind. App. 16, 69 Ind. Dec. 587, 390 N.E.2d 1022 (1979).

Construction.

The court stated it believed a printing error existed in the first sentence of subsection (a) and that it should read "A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Kendrick Mem. Hosp. v. Tottem*, — Ind. App. —, 77 Ind. Dec. 322, 408 N.E.2d 130 (1980).

Enforcement of Award.

The policies favoring arbitration are firmly aligned against permitting a party, who has voluntarily agreed to this form of dispute settlement, to simply ignore an award that has been made and then ask to be given its day in court when, in frustration, the other

party is driven to institute suit for enforcement of the award. *School City v. East Chicago Fed'n of Teachers, Local 511*, — Ind. App. —, 422 N.E.2d 656 (1981).

Public Employees.

This act applies to disputes between public employees and the employer when submitted to arbitration under 4-15-2-35. *Wagner v. Kendall*, — Ind. App. —, 413 N.E.2d 302 (1980).

There is no expression of any intent in the Educational Employee Bargaining Act [20-7-5-1-1] to exclude public employee arbitration cases from the application of the Uniform Arbitration Act [34-4-2-1 et seq.]. *School City v. East Chicago Fed'n of Teachers, Local 511*, — Ind. App. —, 422 N.E.2d 656 (1981).

The Indiana Uniform Arbitration Act applies to labor arbitration agreements between public employers and their employees. *Tippicanoe Educ. Ass'n v. Board of School Trustees*, — Ind. App. —, 429 N.E.2d 967 (1981).

School Corporations with Teachers' Unions.

The Uniform Arbitrations Act [34-4-2-1 — 34-4-2-22] and the Indiana General School Powers Act [20-5-1-1 — 20-5-6-8 (Burns' §§ 38-1701 — 38-1761)] together are broad enough to permit the governing bodies of school corporations to enter into voluntary agreements providing for binding arbitration with teachers' unions. *East Chicago Teachers' Union v. Board of Trustees* (1972), 153 App. 463, 33 Ind. Dec. 64, 287 N.E.2d 891.

Schools.

The Indiana Uniform Arbitration Act [34-4-2-1 et seq.] applied to proceedings between a school and the school employees union. *School City v. East Chicago Fed'n of Teachers, Local 511*, — Ind. App. —, 422 N.E.2d 656 (1981).

Waiver.

The right to require arbitration as provided

in contract may be waived by the parties where they fail to request arbitration and the issues sought to be determined by arbitration have been fully litigated before a court of competent jurisdiction. *Shahan v. Brinegar*, 181 Ind. App. 39, 70 Ind. Dec. 3, 390 N.E.2d 1036 (1979).

Even though arbitration may be made an exclusive remedy under the contract nothing in the statute precludes either party from waiving the arbitration provision. *Kendrick Mem. Hosp. v. Tottem*, — Ind. App. —, 77 Ind. Dec. 322, 408 N.E.2d 130 (1980).

34-4-2-2. Initiation of arbitration.

NOTES TO DECISIONS

Waiver.

See note under heading "Waiver," 34-4-2-1.

Shahan v. Brinegar, 181 Ind. App. 39, 70 Ind. Dec. 3, 390 N.E.2d 1036 (1979).

34-4-2-3. Proceedings to compel or stay arbitration. — (a) On application of a party showing an agreement described in section 1 [34-4-2-1] of this chapter, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration. Ten [10] days' notice in writing of the hearing of such application shall be served personally upon the party in default. If the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised without further pleading and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

(b) On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Ten [10] days' notice in writing of the hearing of such application shall be served personally upon the party in default. Such an issue, when in substantial and bona fide dispute, shall be forthwith summarily determined without further pleadings and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.

(c) If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under subdivision (a) of this section, the application shall be made therein. Otherwise and subject to section 17 [34-4-2-17] of this chapter, the application may be made in any court of competent jurisdiction.

(d) Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

(e) An order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown.

(f) If the court determines that there are other issues between the parties which are not subject to arbitration and which are the subject of a pending action or special proceeding between the parties and that a determination of such issues is likely to make the arbitration unnecessary, the court may delay its order to arbitrate until the determination of such other issues or until such earlier time as the court specifies.

(g) On application the court may stay an arbitration proceeding on a showing that the method of appointment of arbitrators is likely to or has resulted in the appointment of a majority of arbitrators who are partial or biased in some relevant respect. The court shall then appoint one or more arbitrators as provided in section 4 [34-4-2-4] of this chapter. [Acts 1969, ch. 340, § 3; 1982, P.L. 198, § 92.]

34-4-2-4

CIVIL PROCEDURE -SPECIAL PROCEEDINGS

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NOTES TO DECISIONS

ANALYSIS

In general
Collective bargaining agreements
Court of law
Existence of agreement to arbitrate.
Waiver

In General.

Where the Indiana Arbitration Act and the Federal Arbitration Act are similar in pertinent part, there is no need to address the issue of which statute applies. *McCrary Eng'g Corp. v. Town of Upland*, — Ind. App. —, 472 N.E.2d 1305 (1985).

Collective Bargaining Agreements.

A collective bargaining agreement, which did not provide the union with a grievance remedy for the employer's contracting with others for its hauling requirements, was the sole source of duty to arbitrate between the parties, and because there was no grievance remedy in the agreement to deal with the contracting of hauling operations to others, the trial court was not in error for granting employer's motion for summary judgment. *United Food & Com. Workers Int'l Union v. County Lane Cheese Co.*, — Ind. App. —, 469 N.E.2d 470 (1984).

Court of Law.

Where issue of whether insurance policies afforded coverage in a particular situation was not included within the scope of the mandatory arbitration clause, the issue may be decided by a court of law and not by an arbitrator. *McNall v. Farmers Ins. Group*, 181 Ind. App. 501, 70 Ind. Dec. 698, 392 N.E.2d 520 (1979).

Existence of Agreement to Arbitrate.

Where a party's objection to arbitration was that the contract containing the arbitration clause was executed without the requisite authority, it was proper for the trial court to determine the threshold question of whether an agreement to arbitrate existed. *McCrary Eng'g Corp. v. Town of Upland*, — Ind. App. —, 472 N.E.2d 1305 (1985).

Waiver.

See note under heading "Waiver," 34-4-2-1 *Shahan v. Brinegar*, 181 Ind. App. 39, 70 Ind. Dec. 3, 390 N.E.2d 1036 (1979).

Where insurance company denies liability on policy it waives arbitration clause. *McNall v. Farmers Ins. Group*, 181 Ind. App. 501, 70 Ind. Dec. 698, 392 N.E.2d 520 (1979).

34-4-2-4. Appointment of arbitrators by court.

Cited: *School City v. East Chicago Fed'n of Teachers*, Local 511, — Ind. App. —, 422 N.E.2d 656 (1981).

34-4-2-5. Majority action by arbitrators. — The powers of the arbitrators may be exercised by a majority unless otherwise provided by the agreement or by this chapter. [Acts 1969, ch. 340, § 5; 1982, P.L. 198, § 93.]

34-4-2-6. Hearing. — Unless otherwise provided by the agreement:
(a) The arbitrators shall appoint a time and place for the hearing and cause notification to the parties to be served personally or by registered mail not less than thirty [30] days before the hearing. Appearance at the hearing waives such notice. The arbitrators may adjourn the hearing from time to time as necessary and, on request of a party and for good cause, or upon their own motion may postpone the hearing to a time not later than the date fixed by the agreement for making the award unless the parties consent to a later date. The arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear. The court on application may direct the arbitrators to proceed promptly with the hearing and determination of the controversy. Any party may require that the hearing be recorded in a manner sufficient for appeal.

(b) The parties are entitled to be heard, to present any and all evidence material to the controversy regardless of its admissibility under judicial rules of evidence.

(c) The hearing shall be conducted by all the arbitrators but a majority may determine any question and render a final award. If, during the course of the hearing, an arbitrator for any reason ceases to act, the remaining

neutral arbitrator or neutral arbitrators may continue with the hearing and determination of the controversy. [Acts 1969, ch. 340, § 6, p. 1429.]

Compiler's Notes. This section was reprinted to correct an error in the bound volume

Cited: *School City v. East Chicago Fed'n of Teachers*, Local 511, — Ind. App. —, 422 N.E.2d 656 (1981).

34-4-2-7. Representation by attorney. — A party has the right to be represented by an attorney at any proceeding or hearing under this chapter. A waiver thereof of such right prior to the proceeding or hearing is ineffective. [Acts 1969, ch. 340, § 7; 1982, P.L. 198, § 94.]

34-4-2-9. Award.

Opinions of Attorney General. The general assembly intended this section to require an arbitrator to make a written determination of all the questions which are necessary

to decide the controversy, but such determination need not be in the form of specific findings of fact and conclusions of law. 1978, No. 15, p. —; 1 IR 1070.

34-4-2-10. Change of award by arbitrators. — On written application of a party or, if an application to the court is pending under section 12, 13, or 14 [34-4-2-12, 34-4-2-13, or 34-4-2-14] of this chapter, on submission to the arbitrators by the court under such conditions as the court may order, the arbitrators may modify or correct the award upon the grounds stated in subdivisions (1) and (3) of section 14 (a) [34-4-2-14(a)] of this chapter, or for the purpose of clarifying the award. The application shall be made within twenty [20] days after delivery of the award to the applicant. Written notice thereof shall be given forthwith to the opposing party, stating that he must serve his objections thereto, if any, within ten [10] days from the notice. The award so modified or corrected is subject to the provisions of sections 12, 13, and 14 of this chapter. [Acts 1969, ch. 340, § 10; 1982, P.L. 198, § 95.]

Cited: *Southwest Parke Educ. Ass'n v. Southwest Parke Community School*

Trustees Corp., — Ind. App. —, 427 N.E.2d 1140 (1981).

34-4-2-12. Confirmation of an award. — Upon application of a party, but not before ninety [90] days after the mailing of a copy of the award to the parties, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in sections 13 and 14 [34-4-2-13 and 34-4-2-14] of this chapter. Upon confirmation, the court shall enter a judgment consistent with the award and cause such entry to be docketed as if rendered in an action in said court. [Acts 1969, ch. 340, § 12; 1982, P.L. 198, § 96.]

Indiana Law Review. Survey of Recent Developments in Indiana Law, Labor Law (Edward P. Archer), 16 Ind. L. Rev. 225.

Cited: *School City v. East Chicago Fed'n of Teachers*, Local 511, — Ind. App. —, 422 N.E.2d 656 (1981).

NOTES TO DECISIONS

ANALYSIS

Application in federal cases.
Evidence.
Failure to raise challenge.
Limitations.
Purpose.

Application in Federal Cases.

This section provided the appropriate statute of limitations in a case arising under § 301 of the Labor Management Relations Act. *Chauffeurs Local 135 v. Jefferson Trucking Co.*, 628 F.2d 1023 (7th Cir. 1980), cert. denied, 449 U.S. 1125, 101 S. Ct. 942, 67 L. Ed. 2d 111 (1981).

Evidence.

Trial court, in proceeding to confirm award, was not required to take into account holdings of other arbitrators in other arbitration proceedings involving the same subject but other persons. *State, Dep't of Administration v. Sights*, — Ind. App. —, 416 N.E.2d 445 (1981).

Failure to Raise Challenge.

A defendant who has a valid ground for challenging an award but who fails to raise such challenge within the 90-day time limit should not be permitted to raise that challenge when plaintiff applies for confirmation of the award. *State, Dep't of Administration v. Sights*, — Ind. App. —, 416 N.E.2d 445 (1981).

Limitations.

Indiana Trial Rule 130.8(1) will not toll the operation of the limitations periods in 34-4-2-13(b), (d) and 34-4-2-12. *Chauffeurs Local 135 v. Jefferson Trucking Co.*, 473 F. Supp. 1235 (S.D. Ind. 1979), aff'd, 628 F.2d 1023 (7th Cir. 1980), cert. denied, 449 U.S. 1125, 101 S. Ct. 942, 67 L. Ed. 2d 111 (1981).

Purpose.

The purpose of the short periods prescribed in the federal and state arbitration statutes for moving courts to vacate an award is to accord the arbitration award finality in a timely fashion. *Chauffeurs Local 135 v. Jefferson Trucking Co.*, 628 F.2d 1023 (7th Cir. 1980), cert. denied, 449 U.S. 1125, 101 S. Ct. 942, 67 L. Ed. 2d 111 (1981).

34-4-2-13. Vacating an award. — (a) Upon application of a party, the court shall vacate an award where:

- (1) The award was procured by corruption or fraud;
 - (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
 - (3) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted;
 - (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section 6 [34-4-2-6] of this chapter, as to prejudice substantially the rights of a party; or
 - (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under section 3 [34-4-2-3] of this chapter and the party did not participate in the arbitration hearing without raising the objection;
- but the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

(b) An application under this section shall be made within ninety [90] days after the mailing of a copy of the award to the applicant, except that, if predicated upon corruption or fraud or other undue means, it shall be made within ninety [90] days after such grounds are known or should have been known.

(c) In vacating the award on grounds other than stated in subsection (a)(5) of this section the court may order a rehearing before new arbitrators chosen as provided in the agreement, or in the absence thereof, by the court in accordance with section 4 [34-4-2-4] of this chapter, or, if the award is vacated on grounds set forth in subsection (a)(3) or (a)(4) of this section the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with section 4 of this chapter. The

time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

(d) If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award. [Acts 1969, ch. 340, § 13; 1982, P.L. 198, § 97.]

Indiana Law Review. Survey of Recent Developments in Indiana Law, Labor Law (Edward P. Archer), 16 Ind. L. Rev. 225.

Cited: Rockville Training Center v.

Peschke, — Ind. App. —, 450 N.E.2d 90 (1983); Grimes v. Louisville & N.R.R., 583 F. Supp. 642 (S.D. Ind. 1984).

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Acts in excess of powers.

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Arbitrator absent from proceedings.

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— Accrual of federal claim.

Federal law.

— Removal to federal court.

Form of relief.

Limitations.

Punitive damages.

Purpose.

Scope of review.

Time limitation.

In General.

This act provides the method for judicial review of the decision of the arbitrator in a dispute between a public employee and the employer when submitted to arbitration under 4-15-2-35, *Wagner v. Kendall*, — Ind. App. —, 113 N.E.2d 320 (1980).

Although a part of what the parties have bargained for by agreeing to arbitrate is dispute resolution based upon the sense of equity or fairness of an impartial umpire who is familiar with their problems and who should not be constrained by legal technicalities, judicial intervention is permissible when public policy requires. *School City v. East Chicago Fed'n of Teachers*, Local 511, — Ind. App. —, 422 N.E.2d 656 (1981).

An arbitrator may be said to have exceeded his authority where he affords a form of relief that public policy does not permit the parties to voluntarily agree to despite the fact he may have jurisdiction over the subject generally and over the parties to the dispute. *Tippecanoe Educ. Ass'n v. Board of School Trustees*, — Ind. App. —, 429 N.E.2d 967 (1981).

Acts in Excess of Powers.

An arbitrator's mistake of law or erroneous interpretation of the law does not constitute an act in excess of the arbitrator's powers. *Southwest Parke Educ. Ass'n v. Southwest Parke Community School Trustees Corp.*, — Ind. App. —, 427 N.E.2d 1140 (1981).

Arbitrariness.

Arbitrariness, capriciousness, and contravention of the evidence are not in themselves grounds for vacating an arbitrator's award. *International Bd. of Elec. Workers, Local 1400 v. Citizens Gas & Coke Util.*, — Ind. App. —, 428 N.E.2d 1320 (1981).

Arbitrator Absent From Proceedings.

Where arbitrator representing the party who brought the arbitration proceedings could not be present on final day of arbitration hearing but attorney for party who brought arbitration proceeding was present, and only evidence presented was that presented by party who brought proceeding, and although other side conducted cross-examination it presented no rebuttal evidence, the failure of the chairman to postpone the hearing because of the absence of the arbitrator representing the party who brought the proceeding did not show that the rights of such party were prejudiced substantially. *Indianapolis Pub. Transp. Corp. v. Amalgamated Transit Union Local 1070*, — Ind. App. —, 414 N.E.2d 966 (1981).

Bias.

Without specific allegations of bias, the size of the award does not raise an inference of partiality, and neither does an arbitrator's consistent reliance on one party's evidence and interpretation of the law. *MSP Collaborative Developers v. Fidelity & Deposit Co.*, 596 F.2d 247 (7th Cir. 1979).

Burden of Proof.

A party who seeks to vacate an arbitration award bears the burden of proving the grounds to set the award aside. *Indianapolis Pub. Transp. Corp. v. Amalgamated Transit Union Local 1070*, — Ind. App. —, 414 N.E.2d 966 (1981).

The Indiana Arbitration Act, 34-4-2-1 et seq., places a heavier burden upon the party seeking to vacate than does the original Uniform Arbitration Act, for it adds the requirement that the award not be correctable without affecting the merits of the decision. *International Bd. of Elec. Workers, Local 1400 v. Citizens Gas & Coke Util.*, — Ind. App. —, 428 N.E.2d 1320 (1981).

Evidence.

See note under heading "Evidence," 34-4-2-12, *State Dep't of Administration v. Sights*, — Ind. App. —, 416 N.E.2d 445 (1981).

Failure to Raise Challenge.

See note under heading "Failure to Raise Challenge," 34-4-2-12, State, Dep't of Administration v. Sights, — Ind. App. —, 416 N.E.2d 445 (1981).

Fair Representation by Union.**—Accrual of Federal Claim.**

A union did not breach its duty of fair representation by not appealing an arbitrator's decision denying an employee's grievance, it having no obligation to appeal such an award. Therefore, whatever federal claim the employee had against the union with respect to the duty of fair representation accrued on the date when the grievance committee rendered its decision, and not on the date when the time expired to seek judicial review of the arbitrator's award in an Indiana court. *Freeman v. Local Union No. 135 Chauffeurs*, 746 F.2d 1316 (7th Cir. 1984).

Federal Law.

The 90-day limit established for actions to vacate an arbitration award applies to actions under the Labor Management Relations Act, 1947, § 301, 29 U.S.C. § 185. *Davidson v. Roadway Express, Inc.*, 650 F.2d 902 (7th Cir. 1981), cert. denied, 455 U.S. 947, 102 S. Ct. 1447, 71 L. Ed. 2d 661 (1982).

A federal suit alleging wrongful discharge and breach of the duty of fair union representation is controlled by the six-month statute of limitations provided in § 10(b) of the National Labor Relations Act, and not by either the statute of limitations for a suit to overrule an arbitrator (34-4-2-13) or the contract limitations period (34-1-2-2). *Ernst v. Indiana Bell Tel. Co.*, 717 F.2d 1036 (7th Cir. 1983).

—Removal to Federal Court.

The removal of a case seeking to vacate an arbitration decision on the theory that it was procured by fraud and misconduct on the basis of federal question jurisdiction is improper, even if the case ultimately revolved around issues which could, in the alternative, have been pleaded under federal law, where the plaintiff asks only for a limited form of special relief clearly available under state arbitration law. *Eby v. Allied Prods. Corp.*, 562 F.Supp. 528 (N.D. Ind. 1983).

Form of Relief.

Where the arbitrator has jurisdiction of the case and of the parties it is only where he affords a form of relief that public policy does not permit the parties to voluntarily agree to.

that he so acts beyond his jurisdiction that the award is void and subject to collateral attack. *School City v. East Chicago Fed'n of Teachers, Local 511*, — Ind. App. —, 422 N.E.2d 656 (1981).

Limitations.

Indiana Trial Rule 13(J)(1) will not toll the operation of the limitations periods in 34-4-2-13(b), (d) and 34-4-2-12. *Chauffeurs Local 135 v. Jefferson Trucking Co.*, 473 F.Supp. 1255 (S.D. Ind. 1979), aff'd, 628 F.2d 1023 (7th Cir. 1980), cert. denied, 449 U.S. 1125, 101 S. Ct. 942, 67 L. Ed. 2d 111 (1981).

Punitive Damages.

An adjudicative tribunal must have not only jurisdiction of the subject and the person, but it must also have the power, or authority, to render the particular judgment entered; the authority to award punitive damages falls within the proscription. *School City v. East Chicago Fed'n of Teachers, Local 511*, — Ind. App. —, 422 N.E.2d 656 (1981).

As the purpose of punitive damages is not to compensate a party for his injury, but such damages are awarded as a matter of public policy to punish wrongdoers and deter future misconduct, the arbitrator's purported award of punitive damages was void and subject to collateral attack, and that portion of the arbitrator's award granting punitive damages was vacated. *School City v. East Chicago Fed'n of Teachers, Local 511*, — Ind. App. —, 422 N.E.2d 656 (1981).

Purpose.

The purpose of the Uniform Arbitration Act is to afford the opportunity to reach a final disposition of differences between parties in an easier, more expeditious manner than by litigation. To accomplish this purpose, the Uniform Act strictly limits judicial review of arbitration awards. *MSP Collaborative Developers v. Fidelity & Deposit Co.*, 596 F.2d 247 (7th Cir. 1979).

Scope of Review.

See note under heading "Scope of Review," 34-4-2-19, State, Dep't of Administration v. Sights, — Ind. App. —, 416 N.E.2d 445 (1981).

Time Limitations.

The purpose of the short periods prescribed in the federal and state arbitration statutes for moving courts to vacate an award is to accord the arbitration award finality in a timely fashion. *Chauffeurs Local 135 v. Jefferson Trucking Co.*, 628 F.2d 1023 (7th Cir. 1980), cert. denied, 449 U.S. 1125, 101 S. Ct. 942, 67 L. Ed. 2d 111 (1981).

34-4-2-14. Modifications or correction award.

Indiana Law Review. Survey of Recent Developments in Indiana Law, Labor Law (Edward P. Archer), 16 Ind. L. Rev. 225.

NOTES TO DECISIONS

Time Limitations.

The purpose of the short periods prescribed in the federal and state arbitration statutes for moving courts to vacate an award is to accord the arbitration award finality in a

timely fashion. *Chauffeurs Local 135 v. Jefferson Trucking Co.*, 628 F.2d 1023 (7th Cir. 1980), cert. denied, 449 U.S. 1125, 101 S. Ct. 942, 67 L. Ed. 2d 111 (1981).

34-4-2-16. Applications to court. — Except as otherwise provided, an application to the court under this chapter shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions. Unless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the service of a summons in civil cases. [Acts 1969, ch. 340, § 16; 1982, P.L. 198, § 98.]

34-4-2-17. Court — Jurisdiction. — The term "court" shall mean any circuit or superior court. The making of an agreement described in section 1 [34-4-2-1] of this chapter providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this chapter and to enter judgment on an award thereunder. [Acts 1969, ch. 340, § 17; 1982, P.L. 198, § 99.]

34-4-2-18. Venue. — An application, as provided for in section 3(a) [34-4-2-3(a)] of this chapter, shall be made to the court in the county where the adverse party resides or has a place of business or, if he has no residence or place of business in this state, to the court of any county. All subsequent applications shall be made to the court hearing the initial application unless the court otherwise directs. [Acts 1969, ch. 340, § 18; 1982, P.L. 198, § 100.]

Cited: Southwest Parke Educ. Ass'n v. Trustees Corp., Ind. App. —, 427 N.E.2d 1140 (1981); Southwest Parke Community School

34-4-2-19. Appeals. — (a) An appeal may be taken from:

(1) An order denying an application to compel arbitration made under section 3 [34-4-2-3] of this chapter;

(2) An order granting an application to stay arbitration made under section 3(b) [34-4-2-3(b)] of this chapter;

(3) An order confirming or denying confirmation of an award;

(4) An order modifying or correcting an award;

(5) An order vacating an award without directing a rehearing; or

(6) A judgment or decree entered pursuant to the provisions of this chapter.

(b) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action. [Acts 1969, ch. 340, § 19; 1982, P.L. 198, § 101.]

Cited: Southwest Parke Educ. Ass'n v. Southwest Parke Community School Trustees Corp., Ind. App. —, 427 N.E.2d

1140 (1981); *State v. Martin*, — Ind. App. —, 460 N.E.2d 986 (1984).

NOTES TO DECISIONS

ANALYSIS

In general.
Scope of review.

In General.

This act provides the method for judicial review of the decision of the arbitrator in a dispute between a public employee and the employer when submitted to arbitration under 4-15-2-35. *Wagner v. Kendall*, — Ind. App. —, 413 N.E.2d 320 (1980).

Scope of Review.

The appellate court in reviewing an arbitration on appeal from proceeding for confirmation and enforcement of award is limited to determining whether the defendant has established any of the grounds for challenging the award permitted by the Uniform Arbitration Act. *State, Dep't of Administration v. Sights*, — Ind. App. —, 416 N.E.2d 445 (1981).

34-4-2-20. Act not retroactive. — This chapter applies only to agreements made subsequent to August 18, 1969. [Acts 1969, ch. 340, § 20; 1982, P.L. 198, § 102.]

Cited: *Pathman Constr. Co. v. Knox County Hosp. Ass'n* (1975), 164 Ind. App. 121, 46 Ind. Dec. 647, 326 N.E.2d 844; *Utopia Coach Corp. v. Weatherwax*, 177 Ind. App. 321, 64 Ind. Dec. 113, 379 N.E.2d 518 (1978).

34-4-2-21. Uniformity of interpretation. — This chapter shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact similar arbitration statutes. [Acts 1969, ch. 340, § 21; 1982, P.L. 198, § 103.]

Cited: *Southwest Parke Educ. Ass'n v. Southwest Parke Community School Trustees Corp.*, — Ind. App. —, 427 N.E.2d 1140 (1981).

NOTES TO DECISIONS

Authority of Other Courts.

The authority of the other courts is very persuasive in the absence of relevant Indiana

decisions. *MSP Collaborative Developers v. Fidelity & Deposit Co.*, 596 F.2d 247 (7th Cir. 1979).

34-4-2-22. Short title. — This chapter may be cited as the Uniform Arbitration Act. [Acts 1969, ch. 340, § 23; 1982, P.L. 198, § 104.]

IMPLEMENTATION PLAN

Final Report

AN INVESTIGATION OF
CLAIMS AND DISPUTE SETTLEMENT BY ARBITRATION
FOR HIGHWAY CONSTRUCTION

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Joint Highway Research Project
Engineering Experiment Station
Purdue University

in cooperation with the

Indiana Department of Highways

and the

U.S. Department of Transportation
Federal Highway Administration

The contents of this report reflect the views of the author who is responsible for the facts and accuracy of the data presented herein. The contents do not necessarily reflect the official views or policies of the Federal Highway Administration. This report does not constitute a standard, specification or regulation.

Purdue University
West Lafayette, Indiana
March 27, 1986
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IMPLEMENTATION PLAN

Arbitration is not used by any of the surrounding State Highway Agencies (SHA's) and only a few local governments. Active participation in development of the system should be sought from all parties that could be affected by highway construction contract claims. Implementing an arbitration system for IDOH highway contract claims is primarily a task for those that will ultimately be using the system. The brief summary presented here is to act as a guide to the areas that need to be addressed in the formulation of enabling legislation for implementation of the method.

The impact of arbitration may be a concern to those recommending implementation. A possible impact of implementing arbitration is an increase in the number of contract disputes submitted as claims. A moderate increase in the number of claims might be expected for some time while everyone is seeing if recovery of any type claim is possible. The lower cost of filing and the relaxed procedures of arbitration make it a feasible choice for small claims. Many of these smaller claims would not be economical to pursue in court because of the long time period before the issue is settled. The time is available now, for the

Department and other interested parties to study the method and select those features that are found to be most desirable.

The determination of how the system will be configured would best be defined by the IDOH as well as the contracting community. Legal personnel are also suggested as liason members for drafting legislation. Committee personnel should represent all facets of the contracting community as well as IDOH departments. Conflicting views with respect to system operation can then be worked out prior to submission of legislation. A fixed time period could be established within the initial legislation to give the system a fair and reasonable trial period. At the time the initial legislation expires, corrections to the procedures and other operational problems can be included in an amendment or, if the system has not performed to expectations, the parties could let the renewal expire and return to the court solution for contract claims.

The committee should be able to address the following issues in developing the arbitration system. These are issues identified in the report as areas where system development as well as implementation may have difficulties. The following list of issues does not include binding or non-binding arbitration as a decision function. If arbitration is selected, binding arbitration is the only logical

choice. Non-binding arbitration would tend to develop into a proving ground for litigation.

1. Type of arbitration (mandatory or discretionary).
2. Method of filing claim (post contract or at time of dispute).
3. Limitations, if any, on claim size (value) eligible for arbitration.
4. Types of claims eligible for arbitration.
5. Selection of an administration system.
6. Arbitration panel selection method.
7. Number of arbitrators for size of claim.
8. Source of arbitrators.
9. Qualifications of arbitrators.
10. Location(s) of hearings.
11. Appropriate fee schedules (possibly should be decided by administration body).
12. Record keeping requirements.
13. Amount of discovery (full, limited, or none).
14. Prehearing conference requirements.
15. Time limit on filing arbitration claims.
16. Status of contract documents in arbitration.
17. Time limit on arbitration decisions.
18. Types of claim issues eligible for arbitration.

Because of the interaction desired for setting the procedures for arbitration the active participants should not have too many "procedural" problems once the system is started. The wide variety of issues presented above are the primary factors preventing the researchers from stating a

preference of one method of arbitration over another. The main report also indicates that mediation is another possible avenue for claims resolution that has little application to highway claims, but could prove to be the best overall procedure.

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